EXHIBIT 104

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

THOMSON REUTERS ENTERPRISE CENTRE GMBH and WEST PUBLISHING CORPORATION,

1:20-cy-00613-SB

Plaintiffs,

v.

CONFIDENTIAL, HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY

ROSS INTELLIGENCE INC., Defendant.

REBUTTAL OF KREIN EXPERT WITNESS REPORT L. KARL BRANTING, J.D., Ph.D.

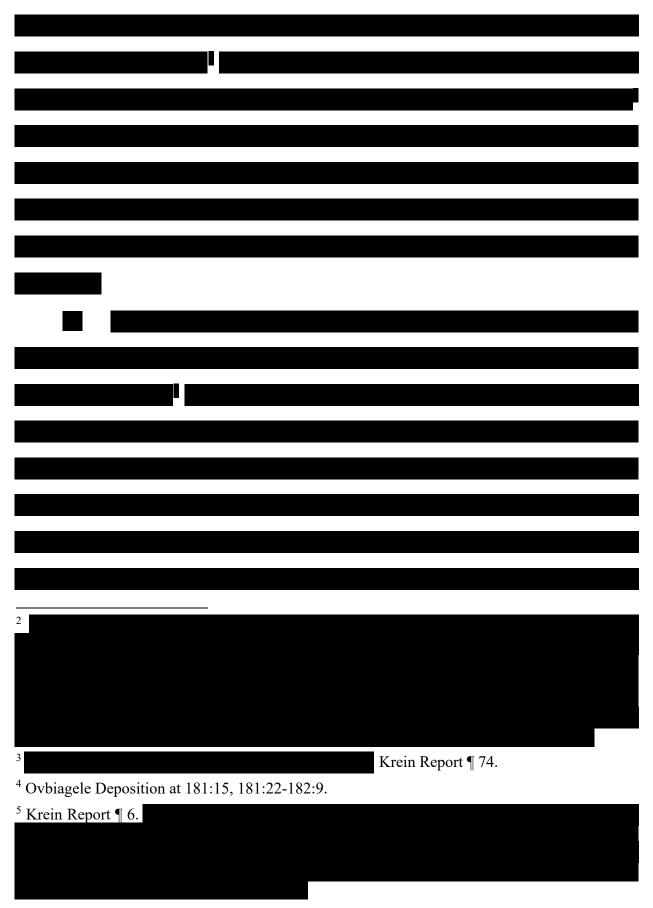
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I.	Introduction	
II.	Information Considered	

III.	SUMN	MARY OF OPINIONS

IV.	DETAILED REBUTTAL OF THE KREIN REPORT

¹ See generally Branting Report Ex. 7.



 $^{^6}$ See e.g., Branting Report ¶¶ 19, 57.

⁷ Krein Report, \P 2.

⁸ See Frederickson-Cross Report ¶ 20

.Id.

⁹ See e.g., Branting Report ¶¶ 50-51.

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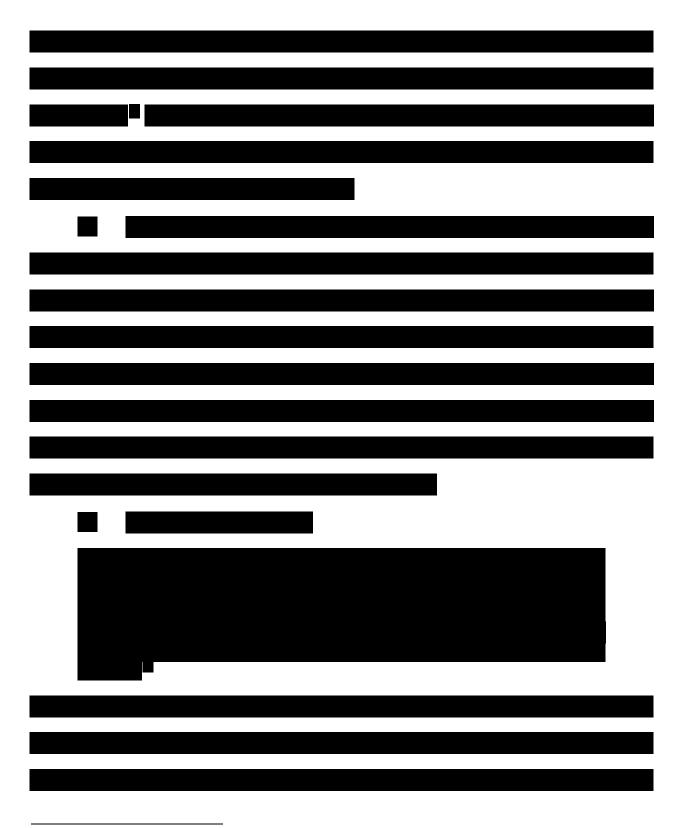
¹⁰ Krein Report, ¶¶ 103-114, 143-149.

¹¹ Third Supplemental Response to Interrogatory No. 1, pp. 69-71.

¹² See e.g., Branting Report ¶ 19.

¹³ See e.g., id.

¹⁴ Krein Report ¶ 148.



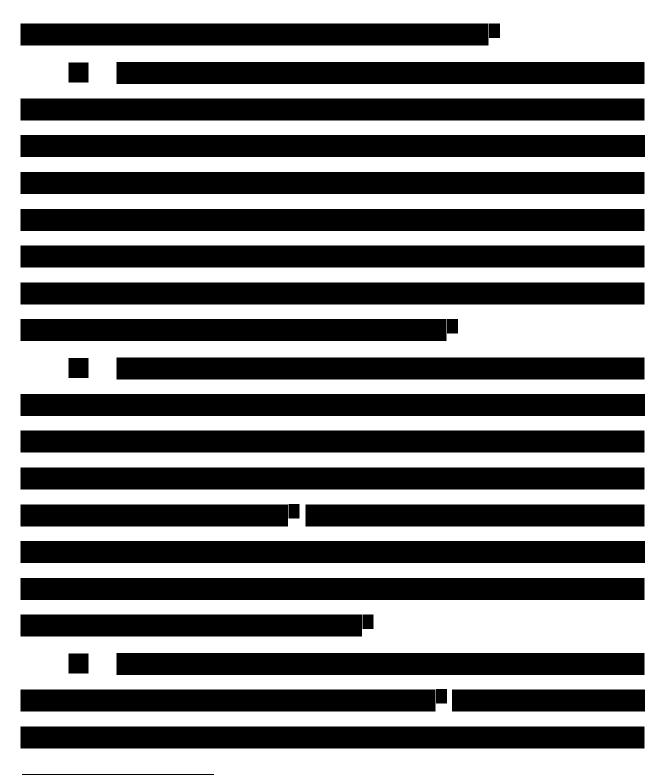
¹⁵ Christopher J. C. Burges, From RankNet to LambdaRank to LambdaMART: An overview, MSR-TR-2010-82 (June 2010), https://www.microsoft.com/en-us/research/wp-content/uploads/ 2016/02/MSR-TR-2010-82.pdf

¹⁶ Krein Report ¶ 135.



¹⁷ Christopher J. C. Burges, From RankNet to LambdaRank to LambdaMART: An overview, MSR-TR-2010-82 (June 2010), https://www.microsoft.com/en-us/research/wp-content/uploads/ 2016/02/MSR-TR-2010-82.pdf.

¹⁸ Krein Report paragraph 113.



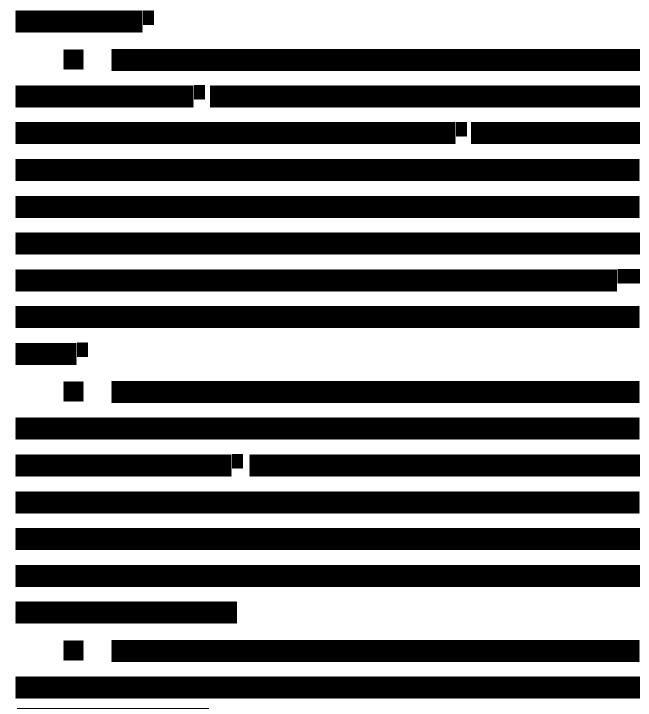
¹⁹ Krein Report ¶ 146.

²⁰ Ovbiagele Depo. at 131:8-10, 16-17; 132:5, 13-15; 133:5-6.

²¹ See Branting Report $\P\P$ 27-29.

²² ROSS-000076307

²³ LEGALEASE-00108391



²⁴ Ovbiagele Depo. at 131:8-10, 16-17; 132:5, 13-15; 133:5-6.

²⁵ Krein Report, ¶ 114.

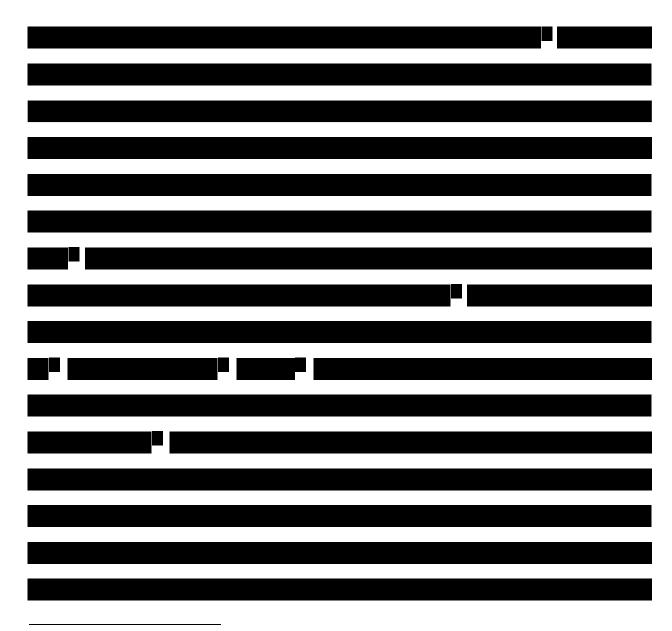
²⁶ See e.g., Krein Report, p. 1 of Appendix C.

²⁷ *Id*.

²⁸ ROSS-000076307 Obviagele Depo. 132:13-15

²⁹ Whitehead Depo. 101:1-10, 107:6-108:9.

 $^{^{30}}$ Krein Report \P 103. See also Krein Report \P 74



³¹ Krein Report ¶ 142.

Moulinier Deposition Transcript, at 62:14; 92:23-24, 86:12-13.

³³ Artificial Intelligence Index Report, 2021, https://aiindex.stanford.edu/wp-content/uploads/2021/03/2021-AI-Index-Report_Chapter-1.pdf, pg. 4.

³⁴ Public Access to NSF-Funded Research, https://www.nsf.gov/news/special_reports/public_access/.

³⁵ https://ai.google/about/.

³⁶ https://allenai.org/.

³⁷ https://www.amazon.science/.

³⁸ The Stanford Law School CodeX Techindex, https://techindex.law.stanford.edu/.



Luther Karl Branty 1 September 2022

³⁹ Krein report ¶ 149.

 $^{^{40}}$ Branting Report ¶ 50.

EXHIBIT 105

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

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) C.A. No. 20-613-SB
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REPLY EXPERT REPORT OF DR. JONATHAN L. KREIN HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

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APPENDICES



¹ Expert Report of Dr. Jonathan L. Krein, August 1, 2022.

² Expert Report of Dr. Jonathan L. Krein, September 6, 2022.

³ Expert Report of L. Karl Branting, J.D., Ph.D., August 1, 2022.

⁴ Expert Report of Barbara Frederiksen-Cross, August 1, 2022.

⁵ Expert Report of L. Karl Branting, J.D., Ph.D., September 6, 2022.

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⁶ Expert Report of Barbara Frederiksen-Cross, September 6, 2022.

⁷ Expert Report of Alan J. Cox, Ph.D., September 6, 2022.

⁸ Expert Report of Richard Leiter, J.D., September 6, 2022.

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⁹ Expert Report of L. Karl Branting, J.D., Ph.D., September 6, 2022, ¶¶ 4–10.

¹⁰ *Ibid*.

¹¹ *Id.*, ¶¶ 5−6.

¹² *Id.*, ¶ 7.

¹³ *Id.*, ¶ 8.

¹⁴ *Id.*, \P 9.

¹⁵ *Id.*, ¶ 10.

¹⁶ *Ibid*.



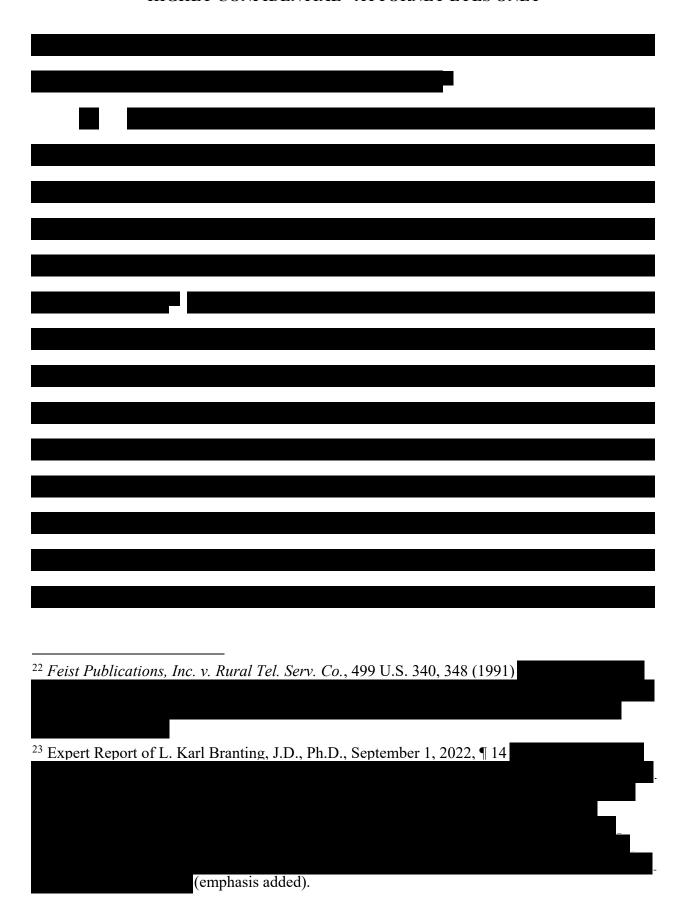
 $^{^{17}}$ *Id.*, ¶ 11.

¹⁸ *Ibid*.

¹⁹ Expert Report of Dr. Jonathan L. Krein, September 6, 2022, ¶ 37.

 $^{^{20}}$ Expert Report of L. Karl Branting, J.D., Ph.D., August 1, 2022, \P 51.

²¹ A. Arruda Dep. Tr. 275:23–276:12 (objections omitted).



²⁴ Expert Report of L. Karl Branting, J.D., Ph.D., September 6, 2022, ¶ 12.

²⁵ *Id.*, ¶ 13.

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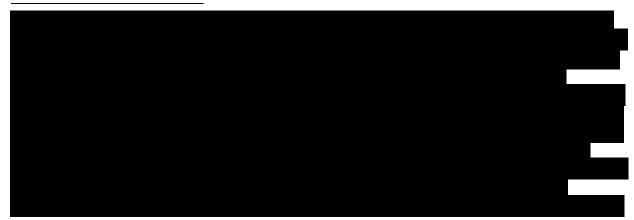
²⁶ See https://medium.com/@AndrewArruda/hold-59effcd819b0.

²⁷ T. van der Heijden Dep. Tr. 136:15-136:20.

²⁸ Expert Report of L. Karl Branting, J.D., Ph.D., September 6, 2022, ¶ 12.

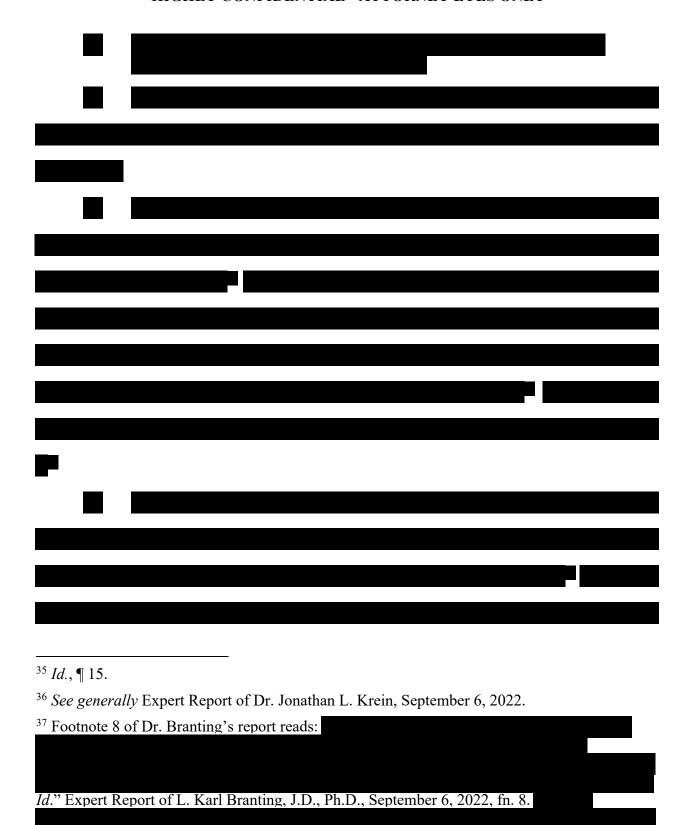
 $^{^{29}}$ Expert Report of Dr. Jonathan L. Krein, August 1, 2022, $\P\P$ 129–144.





³³ Expert Report of L. Karl Branting, J.D., Ph.D., September 6, 2022, ¶ 14.

³⁴ *Ibid*.



³⁸ Expert Report of L. Karl Branting, J.D., Ph.D., September 6, 2022, ¶ 15.

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³⁹ *Id.*, ¶ 17.

⁴⁰ *Ibid*.

⁴¹ See Expert Report of Dr. Jonathan L. Krein, August 1, 2022, ¶ 106.

⁴² See Expert Report of Dr. Jonathan L. Krein, August 1, 2022, ¶ 107; R-LEGALEASE-00189134-R-LEGALEASE-00189139 (

 $^{^{43}}$ See Expert Report of Dr. Jonathan L. Krein, August 1, 2022, \P 113.

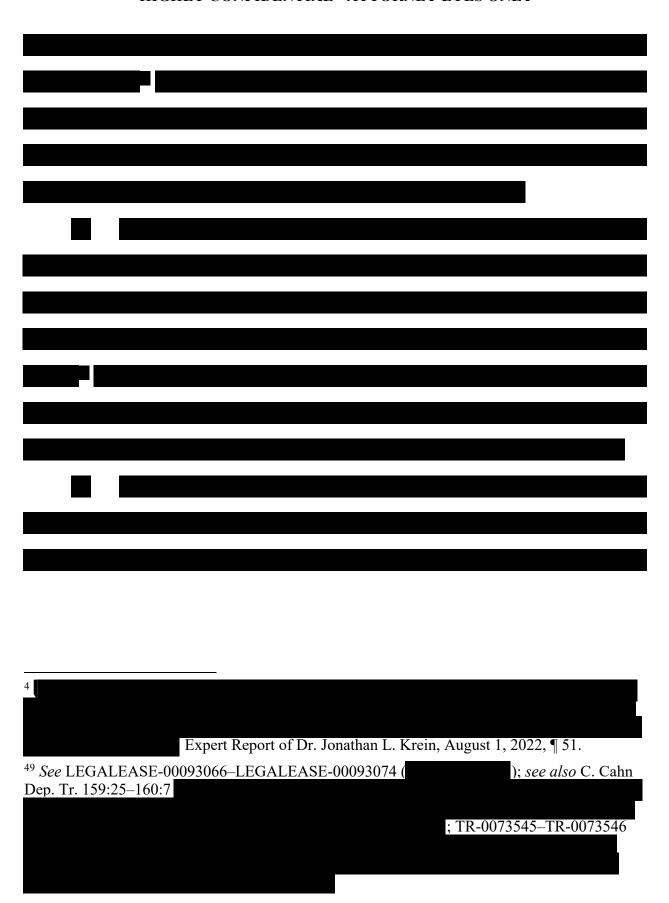


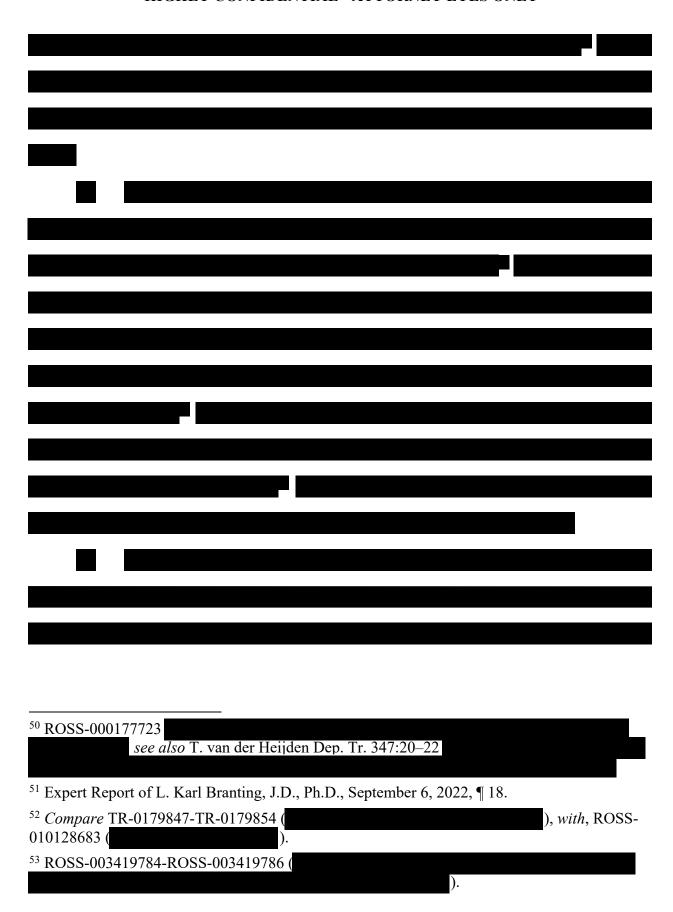
⁴⁴ See Plaintiffs' Second Supplemental Response to ROSS' Interrogatory No. 1, March 23, 2022, pp. 33–37.

⁴⁵ See also Expert Report of Dr. Jonathan L. Krein, August 1, 2022, Appendix C.

⁴⁶ See, e.g., T. Hafeez Dep. Tr. 66:4–17

⁴⁷ Expert Report of Dr. Jonathan L. Krein, September 6, 2022, Section 4.1.





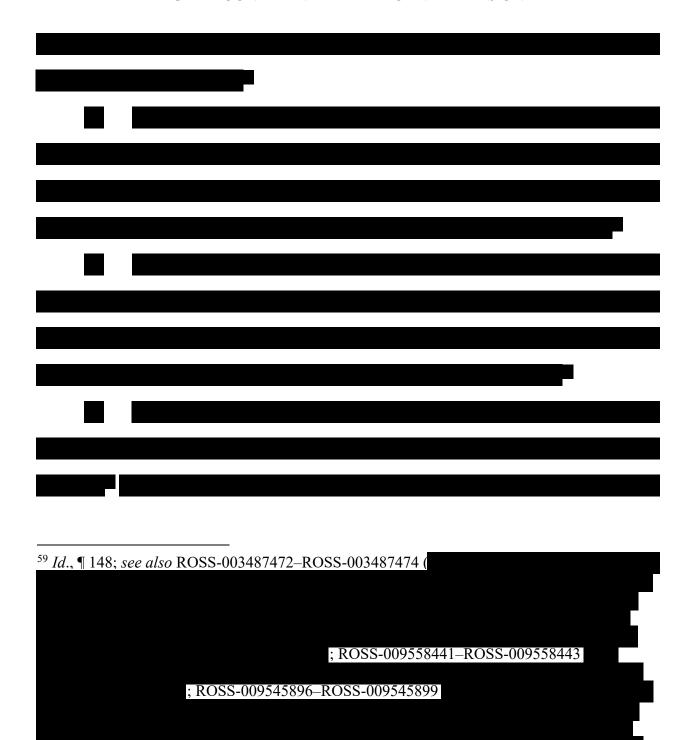
⁵⁴ Expert Report of L. Karl Branting, J.D., Ph.D., September 6, 2022, ¶¶ 24–27.

⁵⁵ *Id.*, ¶ 25.

⁵⁶ *Id.*, ¶ 26.

⁵⁷ *Id*, ¶ 28.

 $^{^{58}}$ See Expert Report of Dr. Jonathan L. Krein, August 1, 2022, \P 147.



; ROSS-003704423-ROSS-003704439 (

⁶⁰ Expert Report of L. Karl Branting, J.D., Ph.D., September 6, 2022, ¶ 19−20.

⁶¹ *Ibid*.

⁶² See ROSS-000076307.

 $^{^{63}}$ Expert Report of L. Karl Branting, J.D., Ph.D., September 6, 2022, \P 20.

⁶⁴ See ROSS-009558441–ROSS-009558443

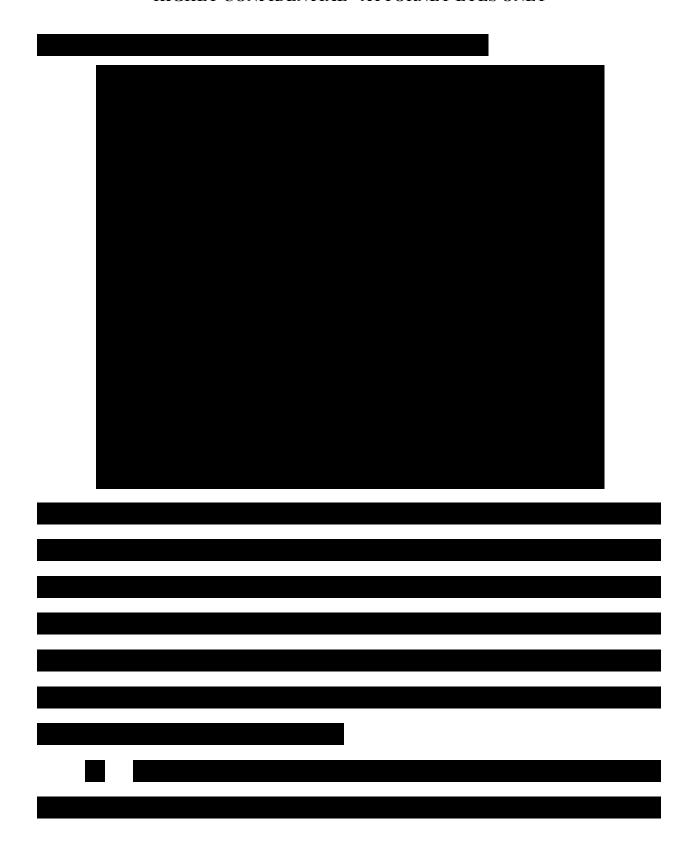
⁶⁵ Expert Report of L. Karl Branting, J.D., Ph.D., September 6, 2022, ¶¶ 21–22.

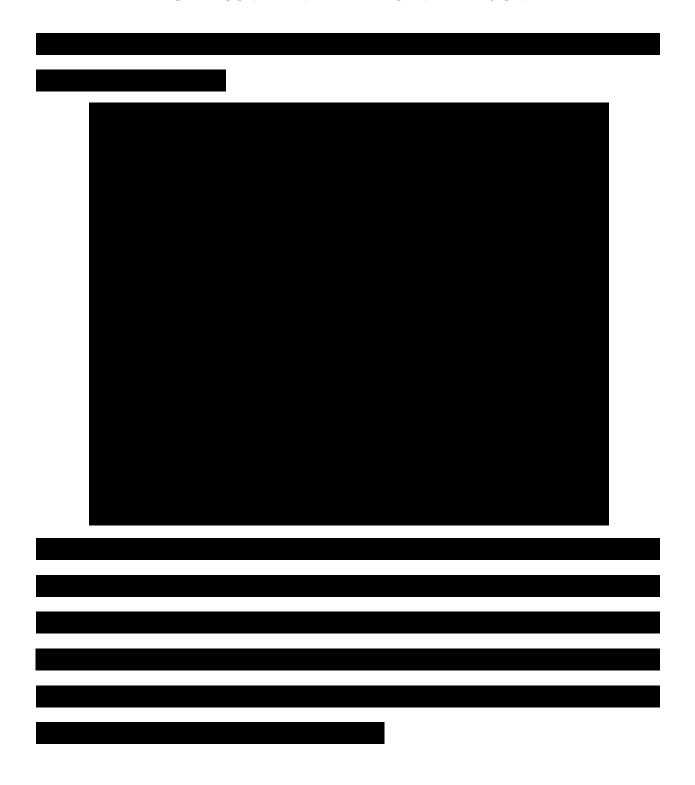
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⁶⁶ *Id.*, ¶ 20.

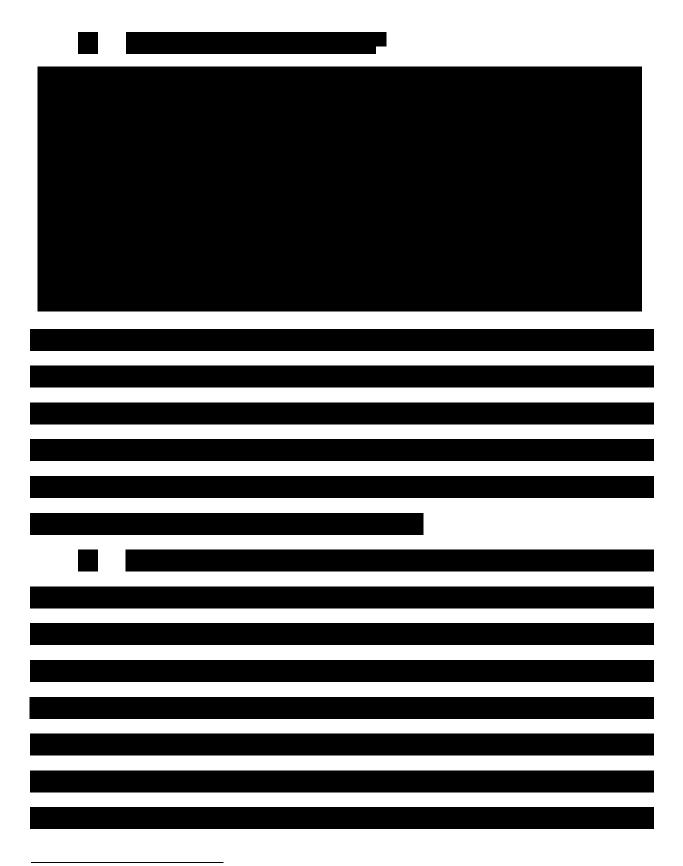
⁶⁷ *Ibid*.

⁶⁸ *Id*., ¶ 21.





⁶⁹ https://xkcd.com/1007/.

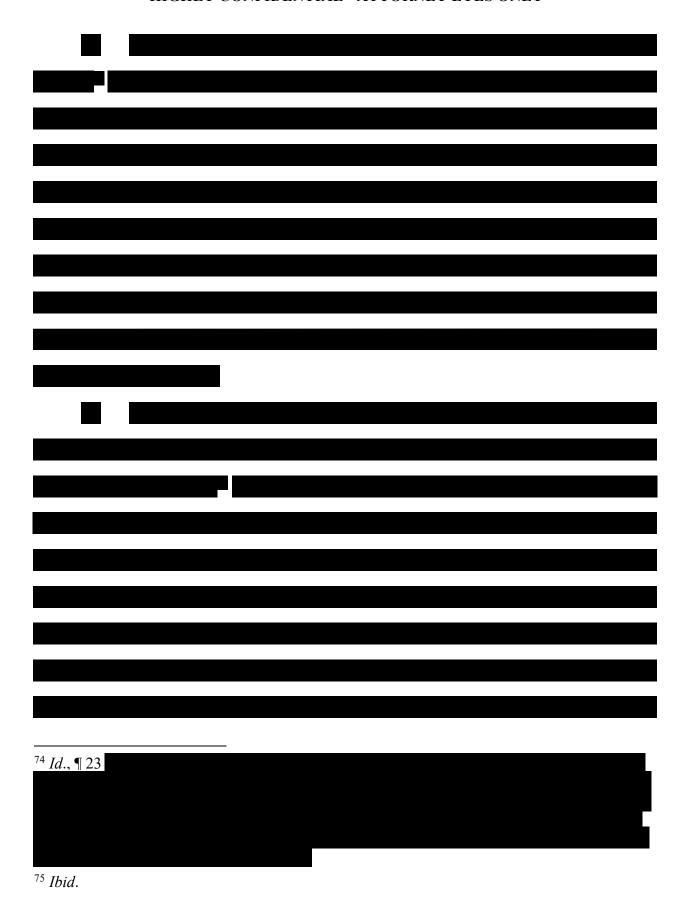


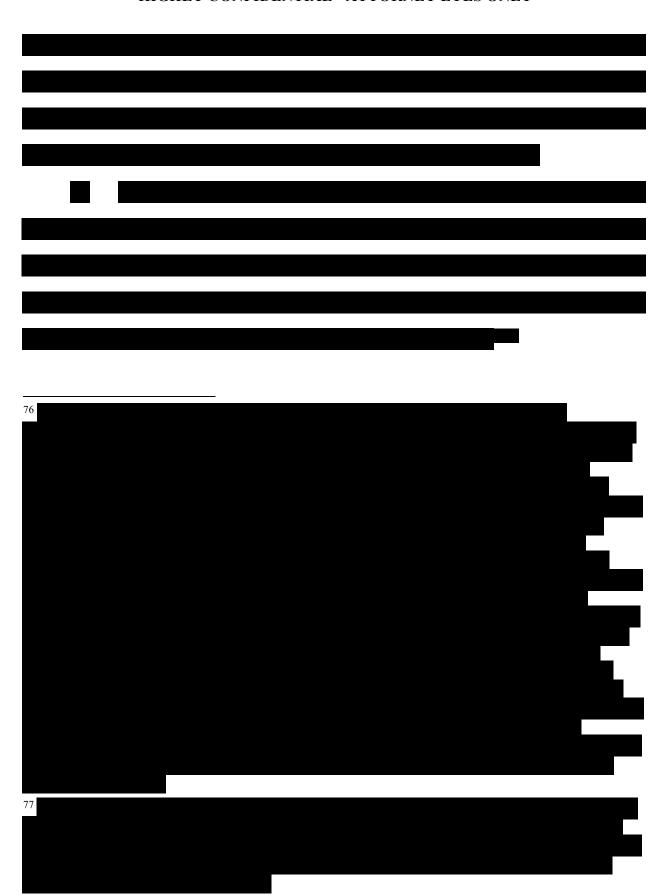
⁷⁰ https://online.stat.psu.edu/stat501/lesson/12/12.8.

⁷¹ Expert Report of L. Karl Branting, J.D., Ph.D., September 6, 2022, ¶¶ 20.

⁷² *Id.*, ¶ 22.

⁷³ *Ibid*.







⁷⁸ Expert Report of Richard Leiter, J.D., September 6, 2022, ¶¶ 1, 6.

⁷⁹ *Id.*, \P 6.

 $^{^{80}}$ Expert Report of Richard Leiter, J.D., September 6, 2022, \P 20.

⁸¹ See Expert Report of Dr. Jonathan L. Krein, August 1, 2022, ¶¶ 71–72; see also TR-0179838-TR-0179842 (
TR-0179830- TR-0179837 (
TR-0432528-TR-0432533 (
TR-0002864–TR-0003137 (
Plaintiffs' Second Supplemental Response to ROSS's Interrogatory No. 1, March 23, 2022, p. 9; L. Oliver Dep. Tr., pp. 198-211, 340-341.



⁸² *Ibid*.

⁸³ *Ibid*.

⁸⁴ See Broad. Music, Inc. v. Moor-Law, Inc., 484 F. Supp. 357, 362–63 (D. Del. 1980); see also Ford Motor Co. v. Summit Motor Prods., Inc., 930 F.2d 277, 294 (3d Cir. 1991).

⁸⁵ C. Cahn Dep. Tr. 161:10-161:23

 $^{^{86}}$ Expert Report of Dr. Jonathan L. Krein, September 6, 2022, $\P\P$ 28–32.

 $^{^{87}}$ Expert Report of Richard Leiter, J.D., September 6, 2022, \P 13.

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 $^{^{88}}$ A full list of Bulk Memos with filenames corresponding to the WKNS Digest Topics is attached hereto as Appendix B.

⁸⁹ Expert Report of Alan J. Cox, Ph.D., September 6, 2022, ¶ 15.

⁹⁰ *Ibid*.

⁹¹ *Ibid*.

⁹² *Ibid*.



⁹³ *Ibid*.

⁹⁴ Expert Reports of James E. Malackowski, August 1, 2022 and September 6, 2022.

⁹⁵ J. Obviagele Dep. Tr. 171:7–11

⁹⁶ ROSS-003332311.

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 $^{^{97}}$ Expert Report of Alan J. Cox, Ph.D., September 6, 2022., \P 21.

 $^{^{98}}$ Expert Report of Alan J. Cox, Ph.D., September 6, 2022., $\P\P$ 19–20.

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 $^{^{99}}$ Expert Report of Alan J. Cox, Ph.D., September 6, 2022, \P 20.

¹⁰⁰ See https://medium.com/@AndrewArruda/hold-59effcd819b0

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 $^{^{101}}$ See Expert Report of Alan J. Cox, Ph.D., September 6, 2022, $\P\P$ 27–35.

¹⁰² Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 930 (2d Cir. 1994).

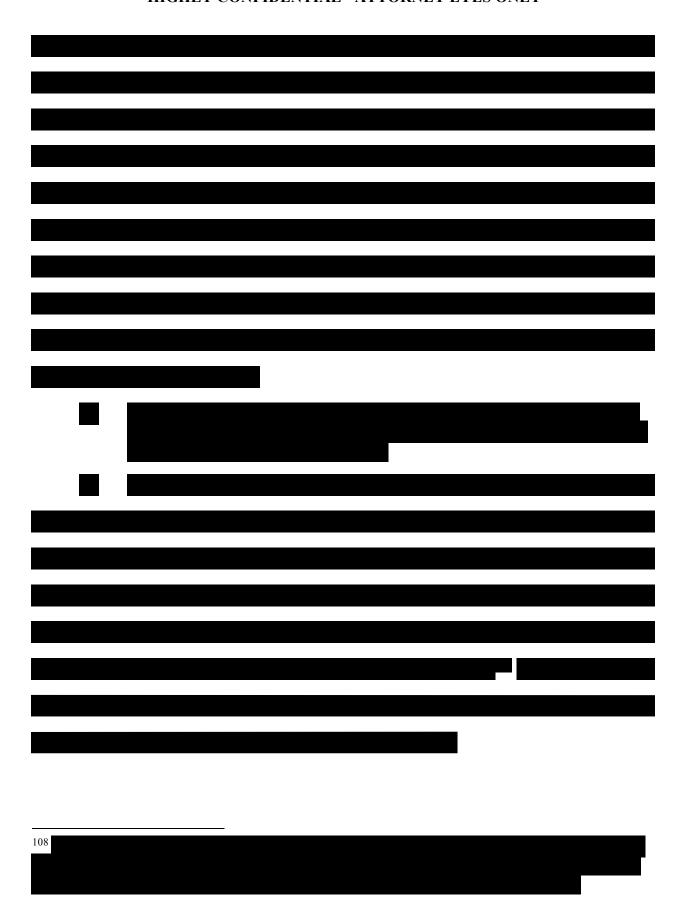
 $^{^{103}}$ *Id.*, ¶ 29.

 $^{^{104}}$ *Id.*, ¶¶ 36–40.

 $^{^{105}}$ Expert Report of Barbara Frederiksen-Cross, September 6, 2022, $\P\P$ 9–15.

 $^{^{106}}$ *Id.*, ¶¶ 9–11.

 $^{^{107}}$ Id., ¶ 15.



 $^{^{109}}$ Expert Report of Barbara Frederiksen-Cross, September 6, 2022, $\P\P$ 25–39.

¹¹⁰ Expert Report of Dr. Jonathan L. Krein, August 1, 2022, fn. 162.

¹¹¹ *Ibid*.

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¹¹² *Ibid*.

¹¹³ See Expert Report of Dr. Jonathan L. Krein, August 1, 2022, Section 9.1.4; see also Expert Report of Dr. Jonathan L. Krein, September 6, 2022, ¶¶ 43, 70, 83.

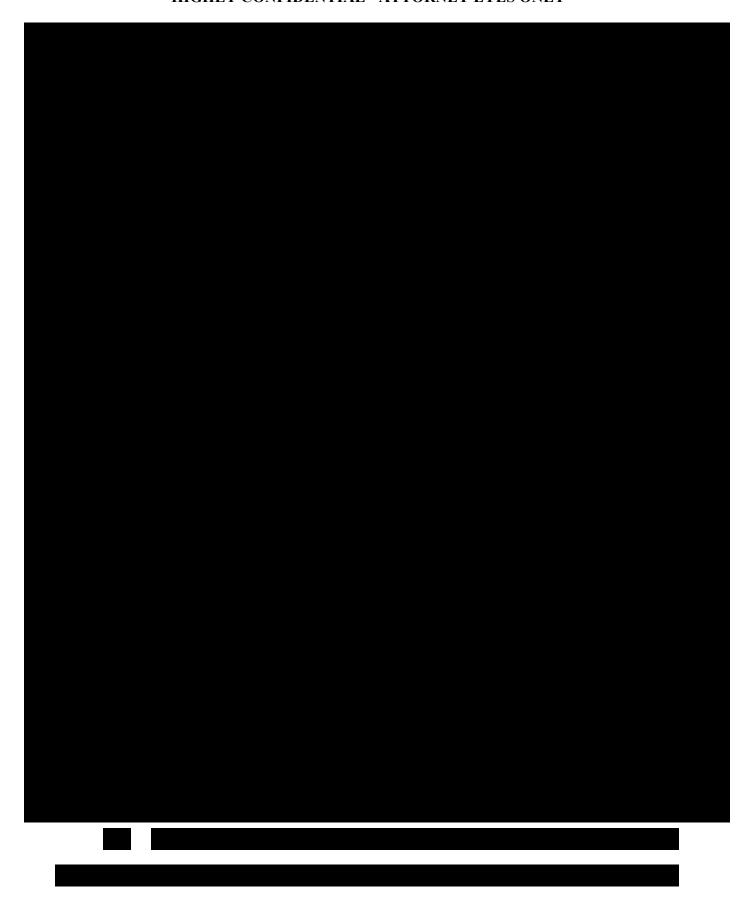
¹¹⁴ Expert Report of Dr. Jonathan L. Krein, September 6, 2022, ¶¶ 76–80.

¹¹⁵ *Ibid*.

 $^{^{116}}$ Expert Report of Barbara Frederiksen-Cross, September 6, 2022, $\P\P$ 36–37.

Ibid.; see also, id., \P 25.

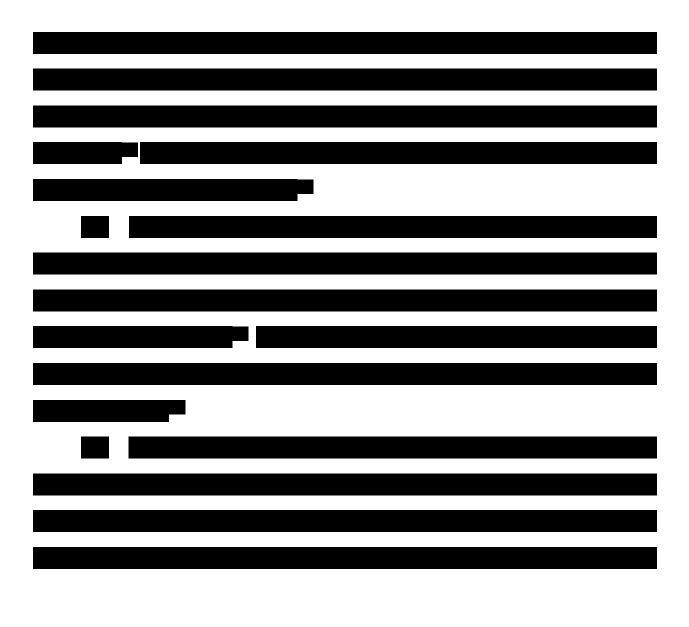
¹¹⁸ *Id.*, ¶ 17.



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¹¹⁹ Expert Report of Barbara Frederiksen-Cross, September 6, 2022.

¹²⁰ *Id.*, ¶ 18.



¹²¹ *Ibid*.

¹²² *Ibid*.

¹²³ C. Cahn Dep. Tr. 161:10-161:23

¹²⁴ Expert Report of Dr. Jonathan L. Krein, September 6, 2022, ¶¶ 28–32.

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 $^{^{125}}$ Expert Report of Barbara Frederiksen-Cross, September 6, 2022, \P 100.

¹²⁶ *Id*.. ¶ 102.

¹²⁷ *Id.*, ¶¶ 104–105.

¹²⁸ Expert Report of Dr. Jonathan L. Krein, August 1, 2022, ¶ 113.

 $^{^{129}}$ Expert Report of Barbara Frederiksen-Cross, September 6, 2022, $\P\P$ 106–108.

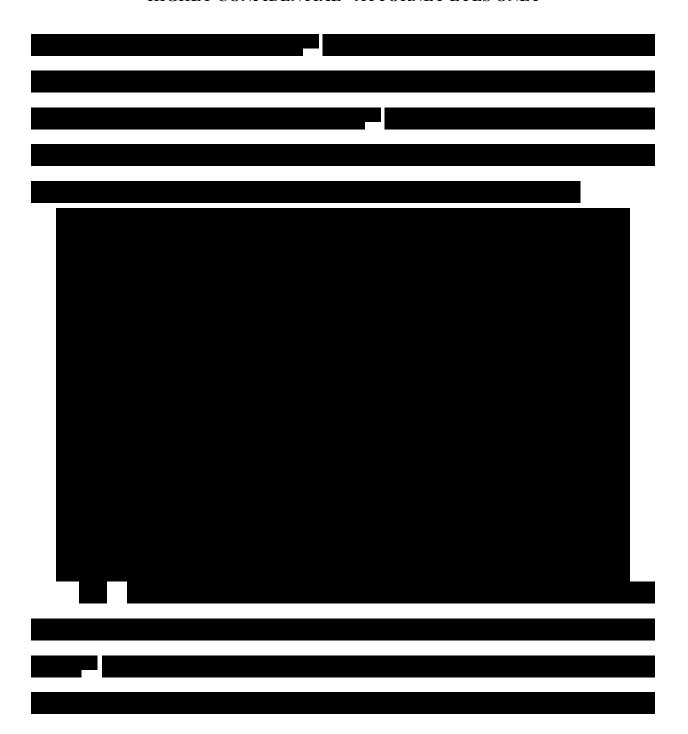
 $^{^{130}}$ *Id.*, ¶ 109 (emphasis in original).

¹³¹ Expert Report of Dr. Jonathan L. Krein, August 1, 2022, Section 9.1.4.

 $^{^{132}}$ Expert Report of Barbara Frederiksen-Cross, September 6, 2022, $\P\P$ 110–116.

 $^{^{133}}$ *Id.*, ¶ 110.

¹³⁴ *Ibid*.



¹³⁵ Expert Report of Dr. Jonathan L. Krein, August 1, 2022, ¶ 146.

¹³⁶ ROSS-003419784-ROSS-003419786

 $^{^{137}}$ Expert Report of Barbara Frederiksen-Cross, September 6, 2022, $\P\P$ 112–116

¹³⁸ *Id.*, ¶ 122.



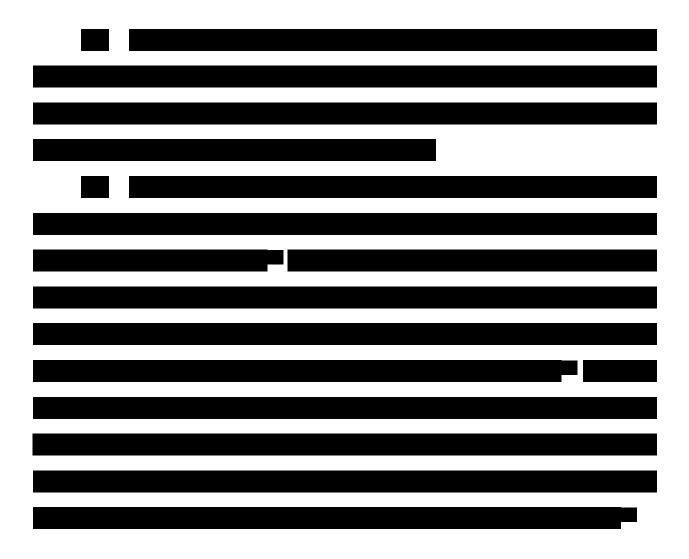
¹³⁹ Expert Report of Dr. Jonathan L. Krein, August 1, 2022, ¶ 109.

¹⁴⁰ Expert Report of Barbara Frederiksen-Cross, September 6, 2022, ¶ 123.

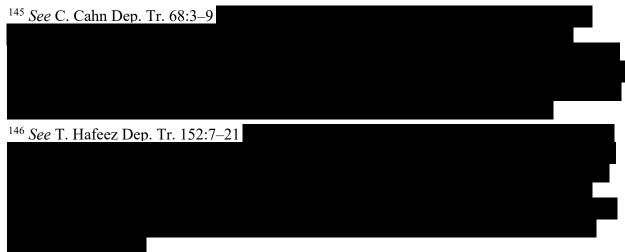
 $^{^{141}}$ *Id.*, ¶¶ 124–126.

 $^{^{142}}$ Expert Report of Barbara Frederiksen-Cross, September 6, 2022, $\P\P$ 21–24.

¹⁴³ *Ibid*.







 $^{^{147}}$ Expert Report of Barbara Frederiksen-Cross, September 6, 2022, \P 22.

¹⁴⁸ LEGALEASE-00059362.

 $^{^{149}}$ Expert Report of Barbara Frederiksen-Cross, September 6, 2022, \P 22.

 $^{^{150}}$ Expert Report of Dr. Jonathan L. Krein, September 6, 2022, \P 109.

¹⁵¹ Expert Report of Dr. Jonathan L. Krein, August 1, 2022, ¶ 112, incl. fn 162.

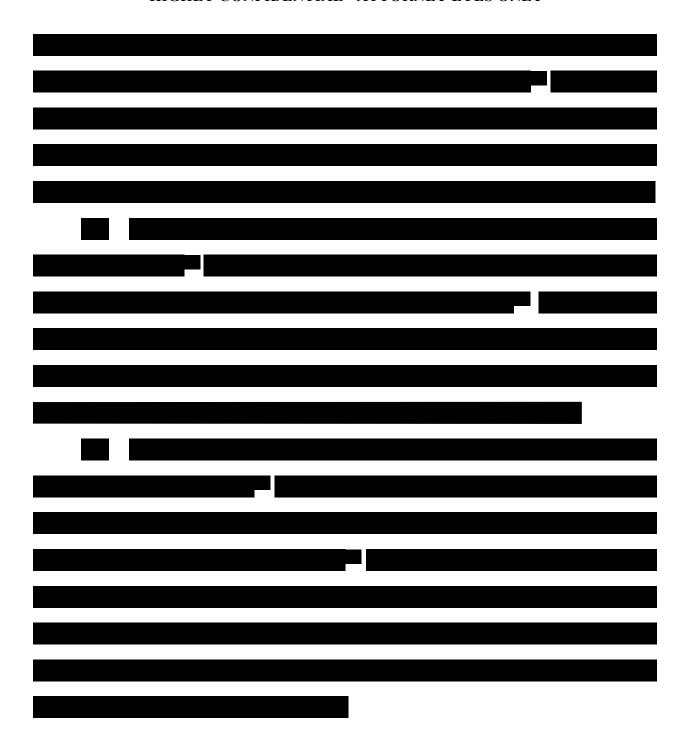
 $^{^{152}}$ Expert Report of Barbara Frederiksen-Cross, September 6, 2022, $\P\P$ 41–42.

¹⁵³ *Ibid*.

 $^{^{154}}$ Expert Report of Dr. Jonathan L. Krein, September 6, 2022, \P 109.

¹⁵⁵ LEGALEASE-00140943-LEGALEASE-00140944.

 $^{^{156} \,} ROSS-003330518-ROSS-003330519.$



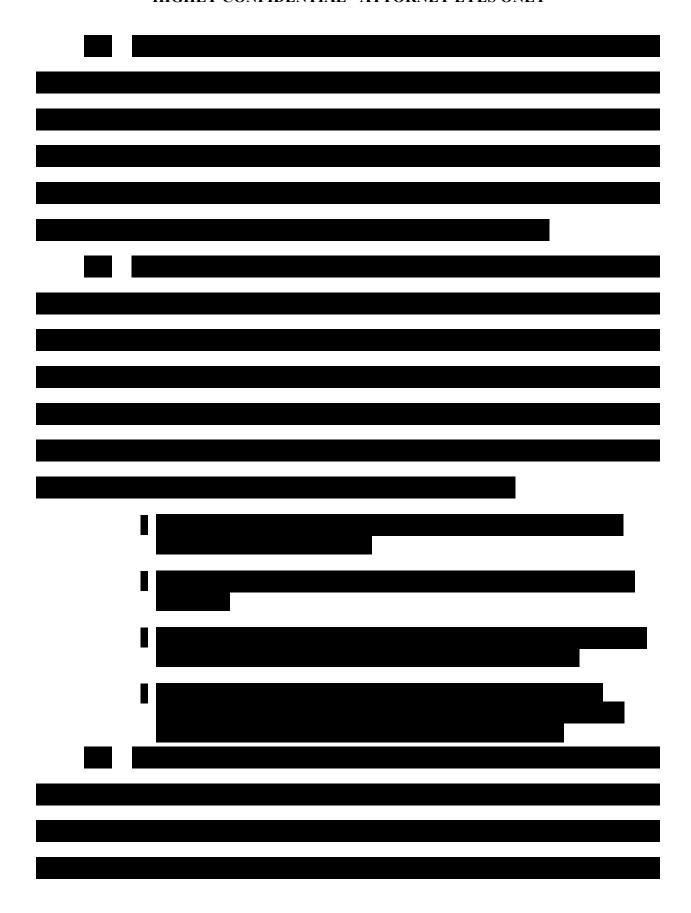
¹⁵⁷ Expert Report of Barbara Frederiksen-Cross, September 6, 2022, ¶¶ 41−54.

¹⁵⁸ *Id.*, ¶ 12.

 $^{^{159}}$ *Id.*, ¶ 48.

 $^{^{160}}$ *Id.*, ¶¶ 45–46.

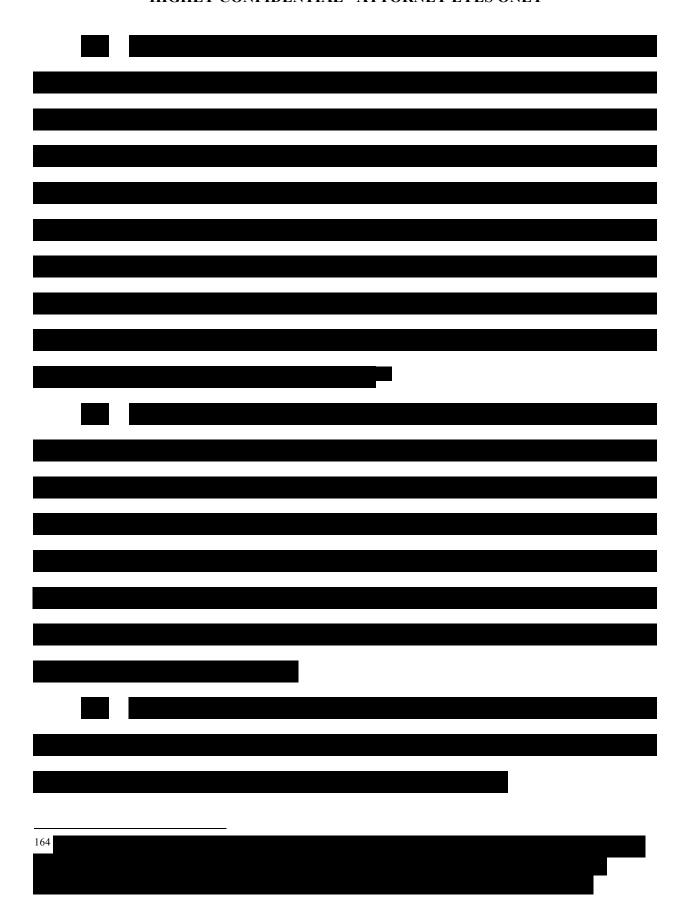
 $^{^{161}}$ Expert Report of Barbara Frederiksen-Cross, August 1, 2022, $\P\P$ 131–132.



¹⁶² Expert Report of Dr. Jonathan L. Krein, August 1, 2022, ¶ 112, incl. fn 162.

 $^{^{163}}$ See, e.g., Expert Report of Barbara Frederiksen-Cross, August 1, 2022, \P 80–89.

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¹⁶⁵ Expert Report of Barbara Frederiksen-Cross, September 6, 2022, ¶¶ 67–97.

¹⁶⁶ Id., ¶¶ 93–97.

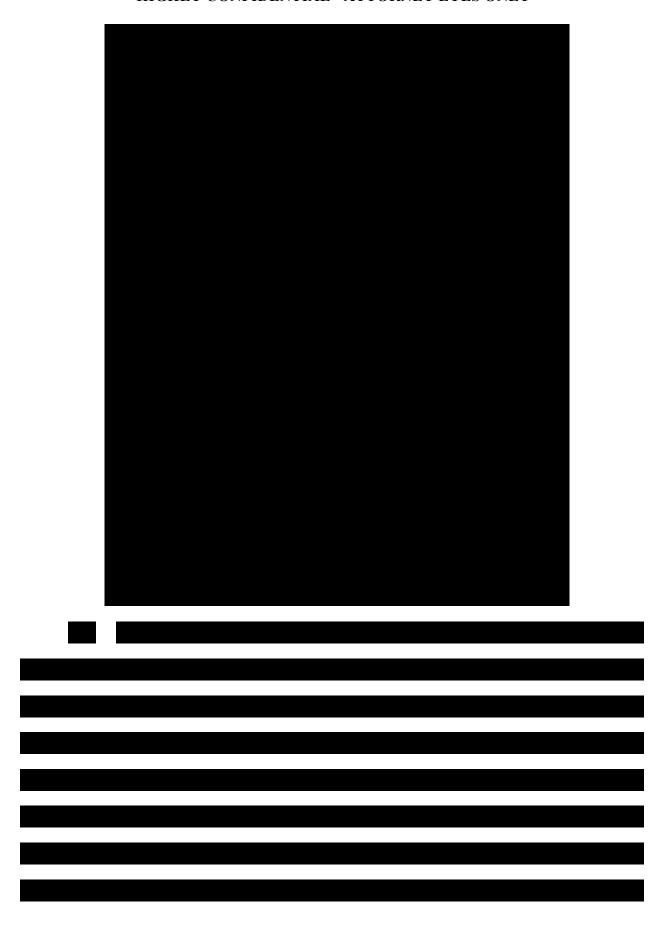


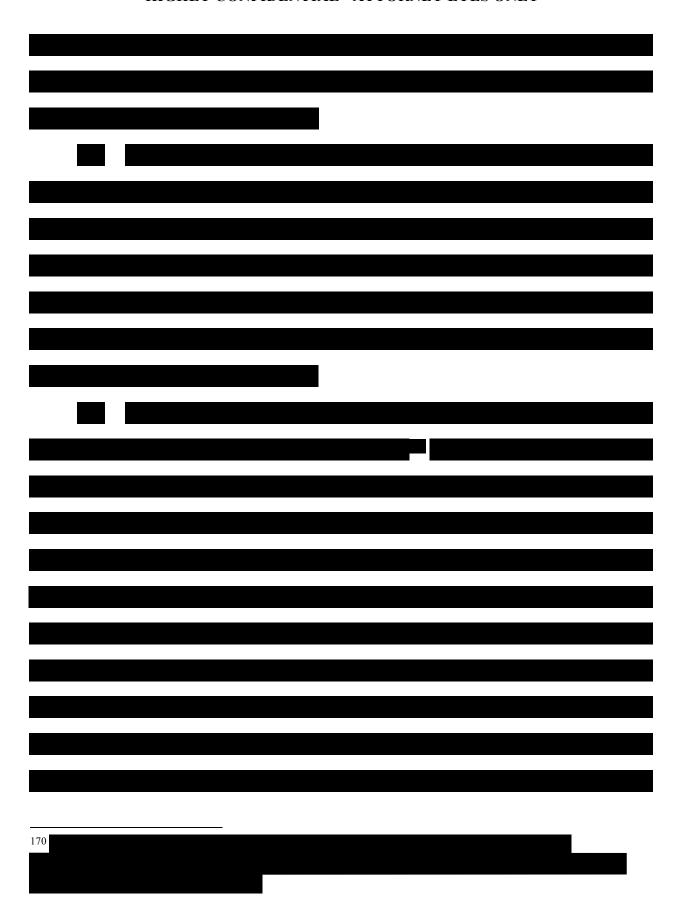
¹⁶⁸ TR-0541943.

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 $^{^{169}}$ Expert Report of Dr. Jonathan L. Krein, September 6, 2022, \P 100.





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 $^{^{171}}$ Expert Report of Barbara Frederiksen-Cross, September 6, 2022, \P 130.

¹⁷² *Id.*, ¶ 132.

¹⁷³ *Ibid*.

¹⁷⁴ *Id.*, ¶ 133.

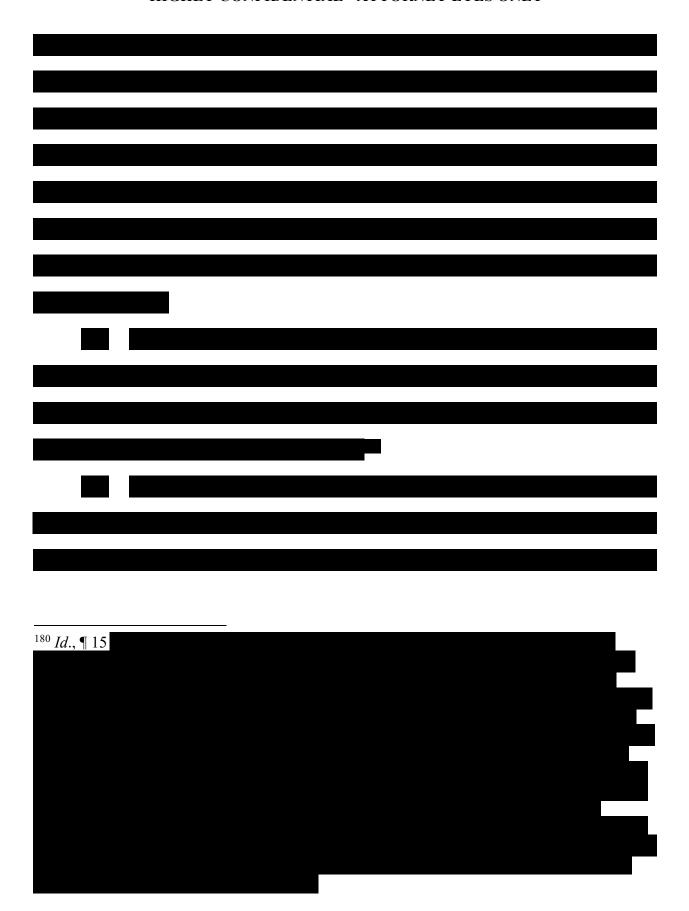
¹⁷⁵ *Id.*, ¶ 134.

¹⁷⁶ *Ibid*.

¹⁷⁷ *Id.*, ¶ 135.

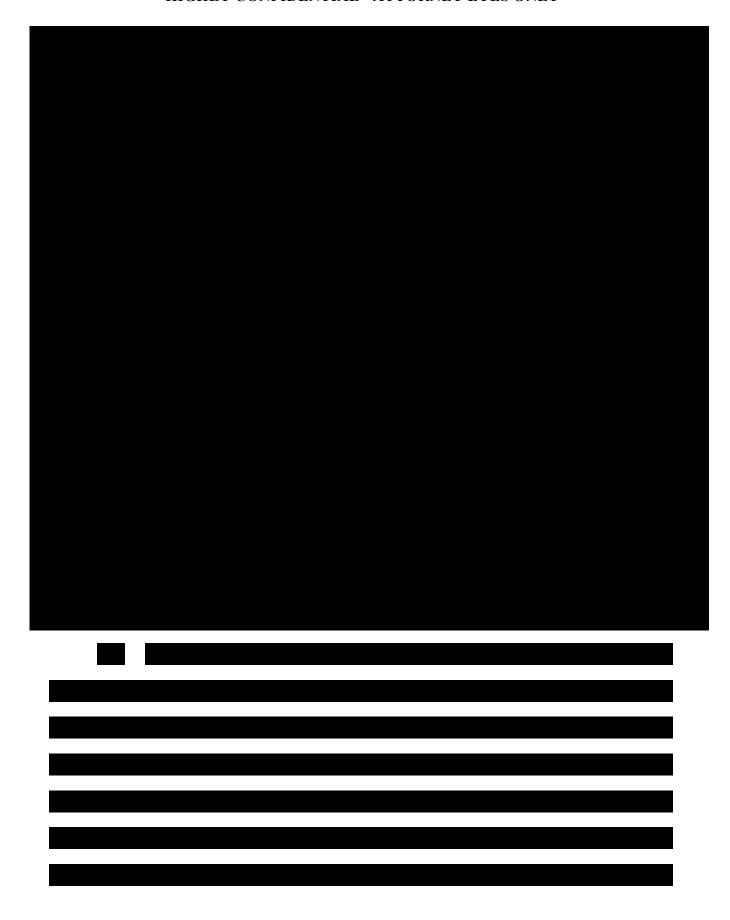
¹⁷⁸ *Ibid*.

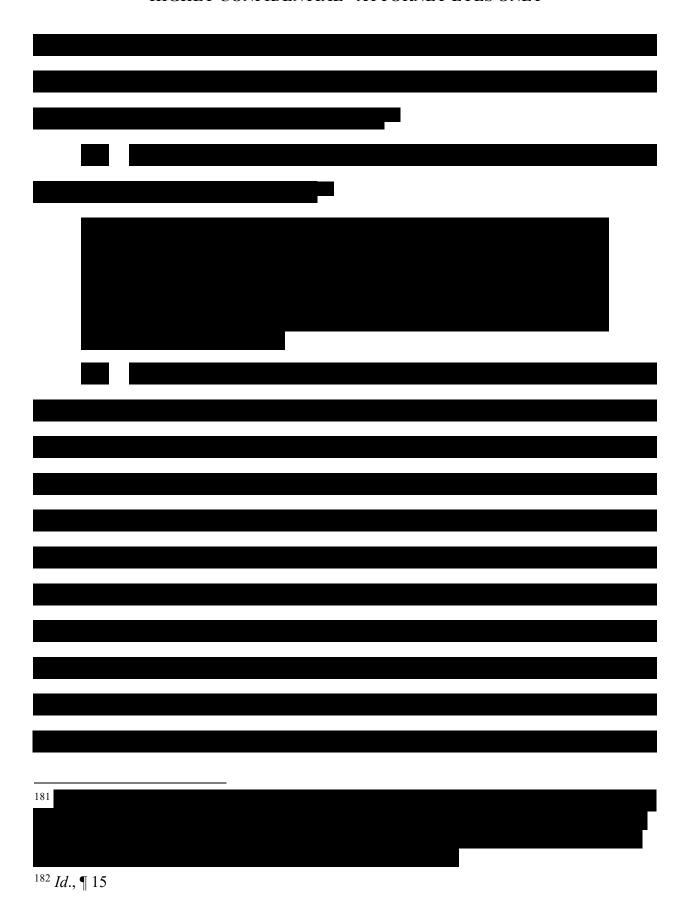
¹⁷⁹ *Id.*, ¶ 139.



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¹⁸³ *Ibid*.

¹⁸⁴ *Ibid*.

¹⁸⁵ *Ibid*.



I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 10, 2022

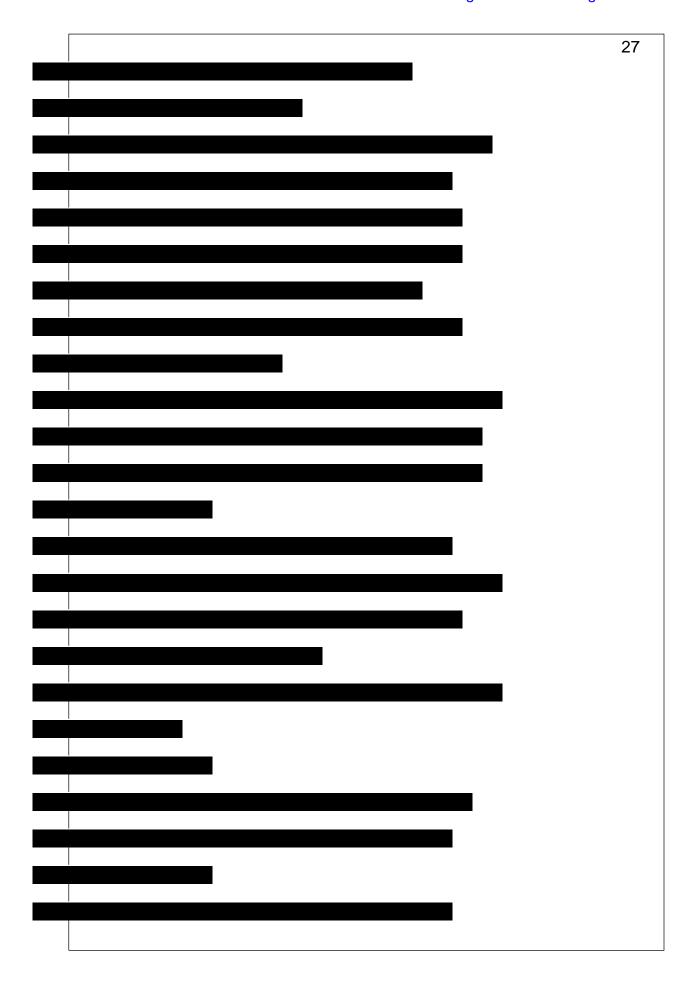
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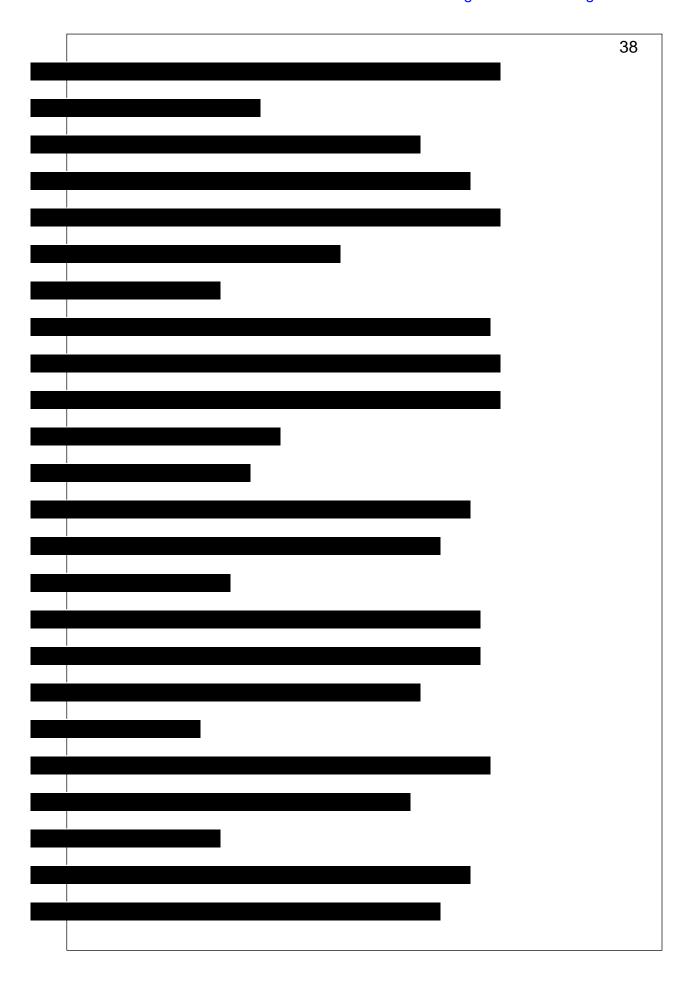
Dr. Jonathan L. Krein

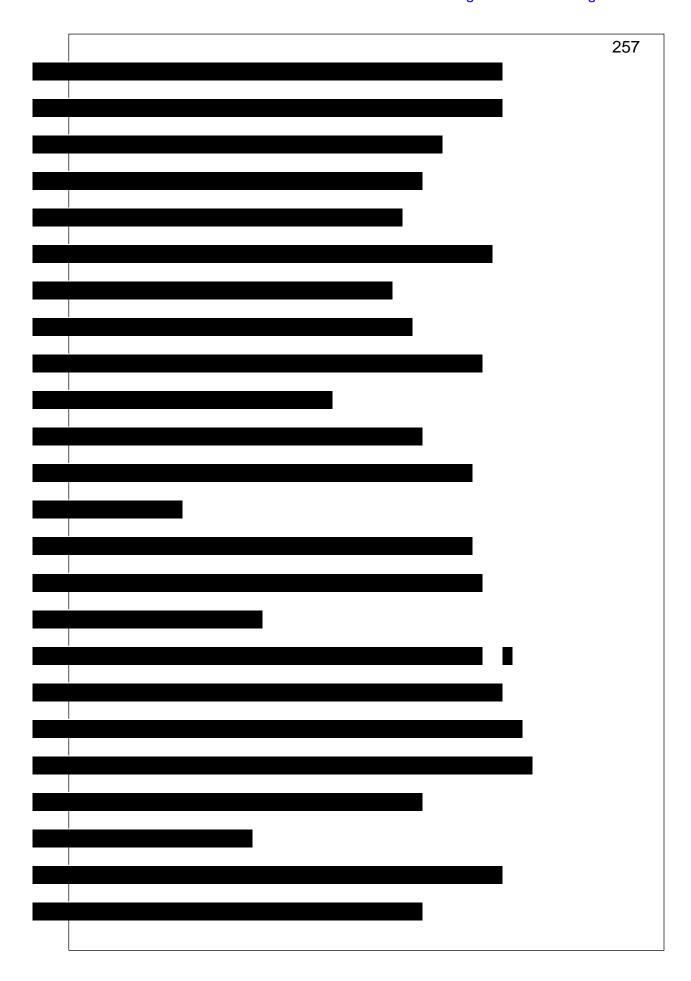
EXHIBIT 106

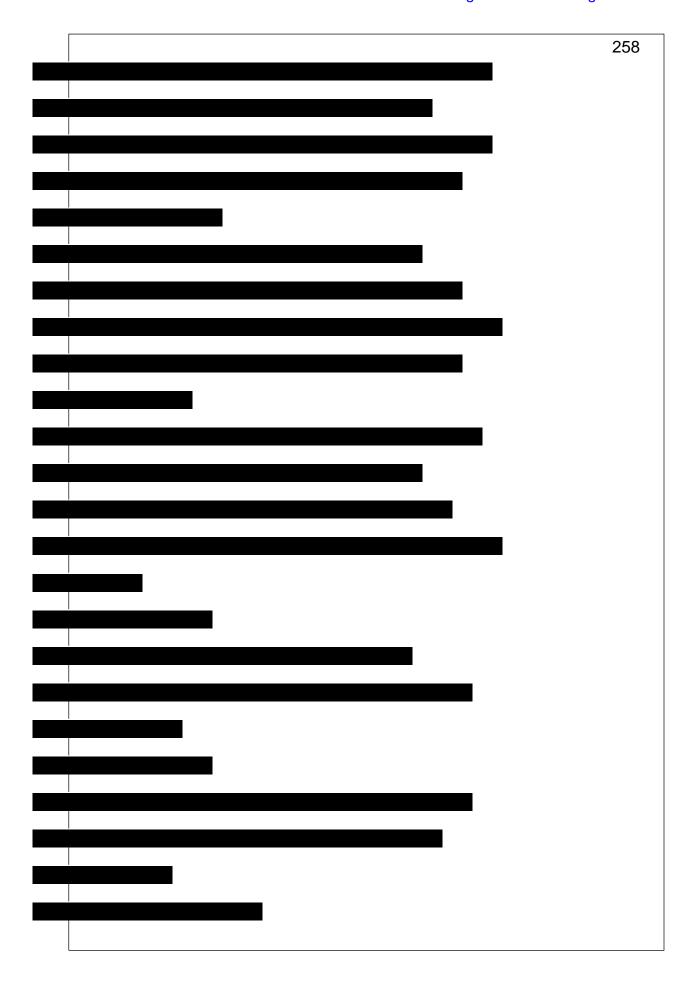
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2	FOR THE DISTRICT OF DELAWARE	
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6	IN RE MATTER OF:	
7	THOMSON REUTERS ENTERPRISE	
8	CENTRE GMBH and WEST PUBLISHING	
9	CORPORATION,	
10	Plaintiffs and Counterdefendants	
11	-vs-	
12	ROSS INTELLIGENCE INC.,	
13	Defendant and Counterclaimant.	
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18	HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY	
19	REMOTE TESTIMONY OF RICHARD A. LEITER	
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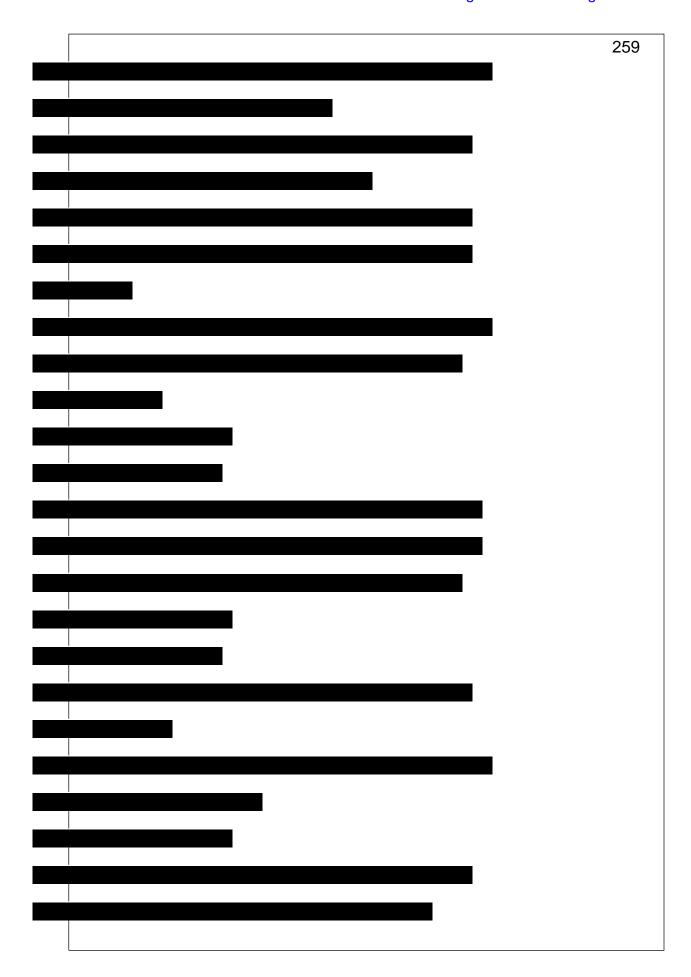














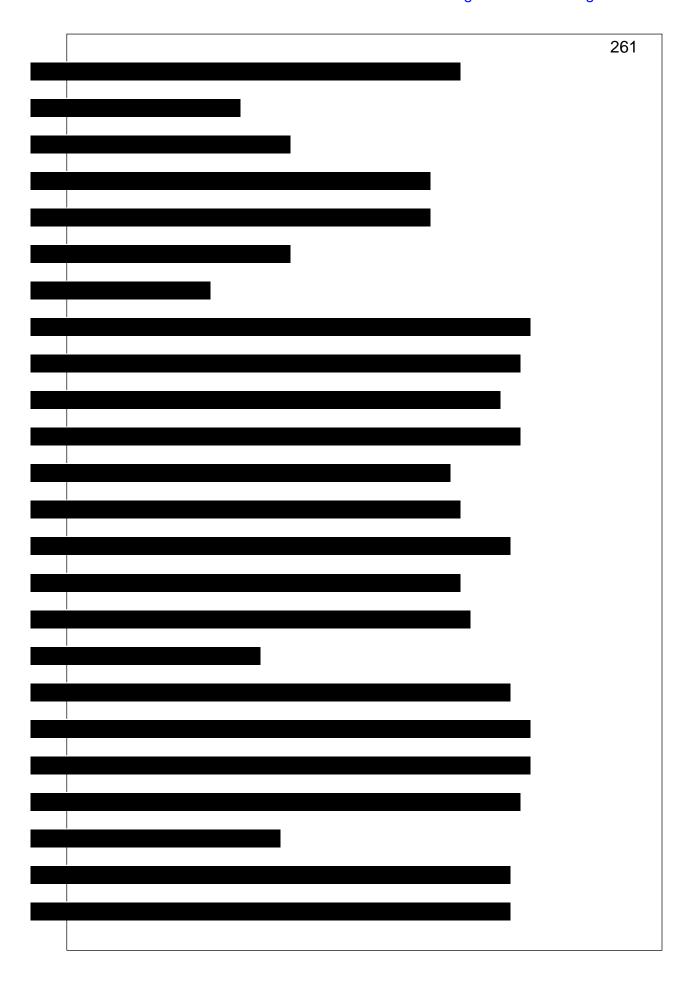


EXHIBIT 107

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         DEPOSITION OF THOMAS LEIGHTON
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        IN THE UNITED STATES DISTRICT COURT
           FOR THE DISTRICT OF DELAWARE
 4
     THOMSON REUTERS ENTERPRISE
 5
     CENTRE GMBH and WEST
     PUBLISHING CORPORATION,
 6
                   Plaintiffs and
 7
                   Counterdefendants,
 8
                                        C.A. No.
     vs.
                                      20-613 (LPS)
   ROSS INTELLIGENCE INC.,
10
                   Defendant and
                   Counterclaimant.
11
12
13
14
               HIGHLY CONFIDENTIAL
         PURSUANT TO THE PROTECTIVE ORDER
15
16
    VIDEOTAPED DEPOSITION OF THOMAS LEIGHTON
17
              MINNEAPOLIS, MINNESOTA
18
                   April 5, 2022
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21
     Reported by:
22
23 KELLY A. HERRICK
24 JOB NO. 208927
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1	DEPOSITION O	E THOMAC	T E T CUTON	Page 14
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EXHIBIT 108

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Page 1
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                    IN THE UNITED STATES DISTRICT COURT
 2
                       FOR THE DISTRICT OF DELAWARE
 3
     THOMSON REUTERS ENTERPRISE
 4
     CENTRE GMBH and WEST PUBLISHING
 5
     CORPORATION,
 6
       Plaintiffs/Counterdefendants,
                                        ) C.A. No. 20-613-LPS
 7
                 vs.
                                        ) Volume I
 8
     ROSS INTELLIGENCE, INC.,
                                        ) Pages 1 to 343
         Defendant/Counterclaimant.
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11
12
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14
           *** HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY ***
15
                     PURSUANT TO THE PROTECTIVE ORDER
16
17
            REMOTE VIDEOCONFERENCED VIDEOTAPED DEPOSITION OF
18
                              JONATHAN KREIN
19
                           Salt Lake City, Utah
20
                        Saturday, October 22, 2022
21
22
23
24
     Reported by:
     ELIZABETH BORRELLI, CSR No. 7844, CCRR, CLR
25
     JOB NO. 218478
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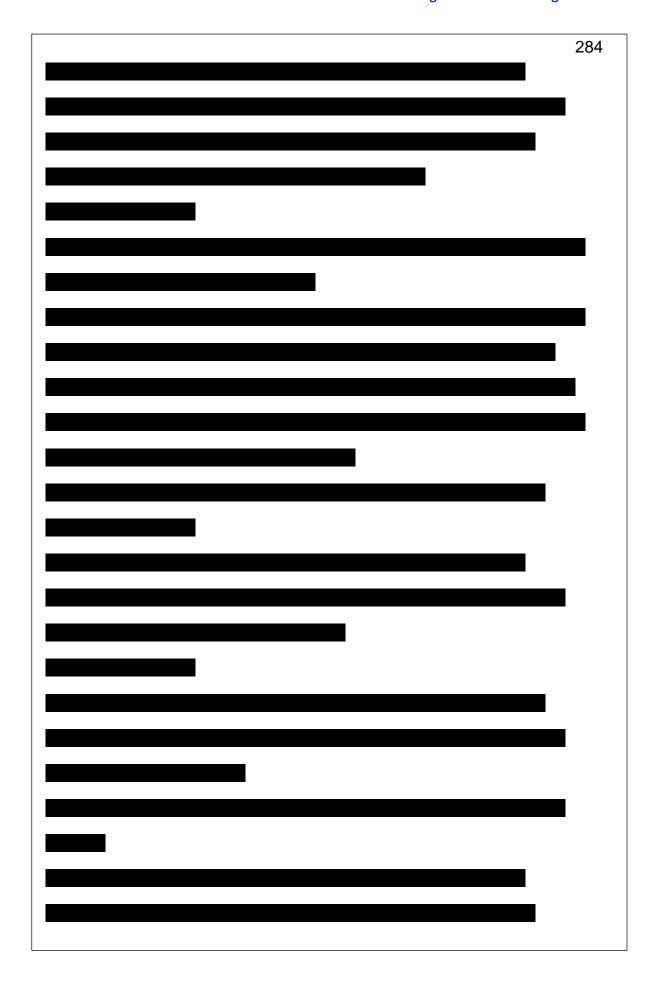
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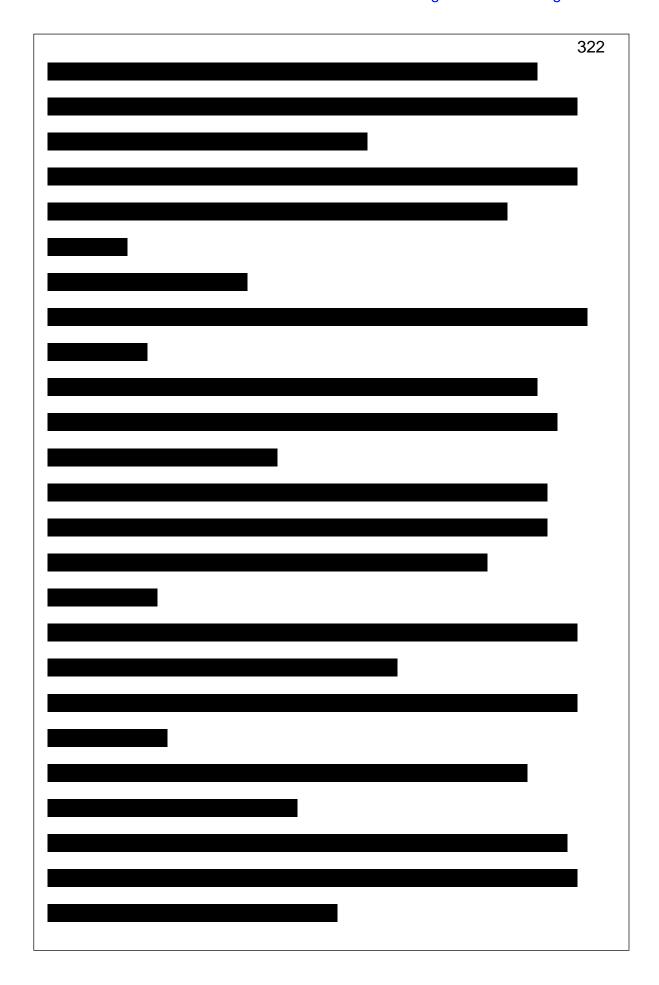
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EXHIBIT 109

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1
             UNITED STATES DISTRICT COURT
             FOR THE DISTRICT OF DELAWARE
THOMSON REUTERS ENTERPRISE
CENTRE GMBH and WEST
PUBLISHING CORPORATION,
           Plaintiffs and
           Counterdefendants,)
                                C.A. No. 20-613 (LPS)
  vs.
ROSS INTELLIGENCE, INC.,
           Defendant and
           Counterplaintiff. )
                **HIGHLY CONFIDENTIAL**
      VIDEOTAPED 30(b)(6) DEPOSITION OF DEFENDANT,
        by and through its corporate designee
                TOMAS VAN DER HEIJDEN,
           (also in his individual capacity)
            London, England, United Kingdom
               Thursday, March 17, 2022
Pages: Pages 1 - 443
Reported stenographically by:
LEAH M. WILLERSDORF, RPR-CRR-FBIVR-ACR-QRR2-CLR
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285



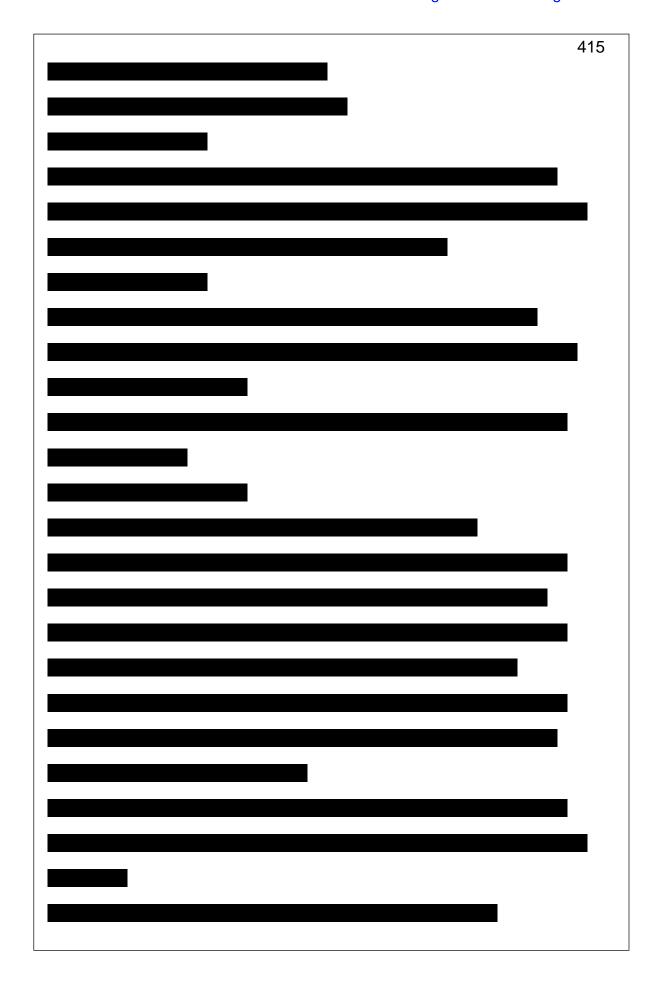


EXHIBIT 110

West Key Number System[®]

Numerical List of Digest Topics

	1	Abandoned and Lost Property	31	Appearance	70	Carriers
	2	Abatement and Revival	34	Armed Services	71	Cemeteries
	4	Abortion and Birth Control	35	Arrest	72	Census
	5	Absentees	36	Arson	73	Certiorari
	6	Abstracts of Title	37	Assault and Battery	74	Champerty and Maintenance
	7	Accession	38	Assignments	75	Charities
	8	Accord and Satisfaction	40	Assistance, Writ of	76	Chattel Mortgages
	9	Account	41	Associations	76A	Chemical Dependents
	10	Account, Action on	42	Assumpsit, Action of	76D	Child Custody
	11	Account Stated	43	Asylums and Assisted	76E	Child Support
	11A	Accountants		Living Facilities	76H	Children Out-of-Wedlock
	12	Acknowledgment	44	Attachment	78	Civil Rights
	13	Action	45	Attorney and Client	79	Clerks of Courts
	14	Action on the Case	46	Attorney General	80	Clubs
	15	Adjoining Landowners	47	Auctions and Auctioneers	81	Colleges and Universities
15A	15A	Administrative Law and	48	Audita Querela	82	Collision
		Procedure	48A	Automobiles	83	Commerce
	16	Admiralty	48B	Aviation	83H	Commodity Futures Trading
	17	Adoption	49	Bail		Regulation
	18	Adulteration	50	Bailment	83T	Common Interest Communities
	19	Adultery	51	Bankruptcy	84	Common Lands
	20	Adverse Possession	52	Banks and Banking	85	Common Law
	21	Affidavits	54	Beneficial Associations	89	Compromise and Settlement
	23	Agriculture	55	Bigamy	90	Confusion of Goods
	24	Aliens, Immigration, and Citizenship	56	Bills and Notes	91	Conspiracy
	25	Alteration of Instruments	58	Bonds	92	Constitutional Law
	25T	Alternative Dispute	59	Boundaries	92B	Consumer Credit
	231	Resolution	60	Bounties	93	Contempt
	26	Ambassadors and Consuls	61	Breach of Marriage Promise	95	Contracts
	27	Amicus Curiae	63	Bribery	96	Contribution
	28	Animals	64	Bridges	96H	Controlled Substances
	29	Annuities	65	Brokers	97C	Conversion and Civil Theft
	29T	Antitrust and Trade	66	Building and Loan Associations	98	Convicts
		Regulation Appeal and Error		Burglary	99	Copyrights and Intellectual Property
	30			Cancellation of Instruments		ιτορειτή

For assistance using Westlaw Classic, call 1-800-WESTLAW (1-800-937-8529).

For free reference materials, visit store.westlaw.com /westlaw/guides.

THOMSON REUTERS WESTLAW

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100	Coroners	136	Dower and Curtesy	178	Food	220	Internal Revenue
101	Corporations and	141	Easements	179	Forcible Entry and	221	International Law
	Business Organizations	142	Ejectment	100	Detainer	222	Interpleader
102	Costs	143	Election of Remedies	180	Forfeitures	223	Intoxicating Liquors
103	Counterfeiting	144	Elections	181	Forgery	224	Joint Adventures
104	Counties	145	Electricity	183	Franchises	226	Joint Tenancy
105	Court	146	Embezzlement	184	Fraud	227	Judges
	Commissioners	148	Eminent Domain	185	Frauds, Statute of	228	Judgment
106	Courts	149	Entry, Writ of	186	Fraudulent Conveyances	229	Judicial Sales
107	Covenant, Action of	149E	Environmental Law	187	Game	230	Jury
108	Covenants	149T		188	Gaming	231	Justices of the Peace
108A	Credit Reporting		Conversion	189	Garnishment	231E	Kidnapping
110	Agencies	150	Equity	190	Gas	231H	Labor and
110	Criminal Law	151	Escape	191	Gifts		Employment
111	Crops	152	Escheat	192	Good Will	233	Landlord and Tenant
113	Customs and Usages	154	Estates in Property	193	Grand Jury	234	Larceny
114	Customs Duties	156	Estoppel	195	Guaranty	237	Libel and Slander
115	Damages	157	Evidence	196	Guardian and Ward	238	Licenses
116	Dead Bodies	158	Exceptions, Bill of	197	Habeas Corpus	239	Liens
117	Death	159	Exchange of		•	240	Life Estates
117G	Debt, Action of	100	Property	198	Hawkers and Peddlers	241	Limitation of Actions
117T	Debtor and Creditor	160	Exchanges	198H	Health	242	Lis Pendens
	Declaratory	161	Execution	200	Highways	245	Logs and Logging
	Judgment	162	Executors and Administrators	201	Holidays	246	Lost Instruments
119	Dedication	163	Exemptions	202	Homestead	247	Lotteries
120	Deeds	164	Explosives	203	Homicide	248	Malicious Mischief
122A	Deposits and Escrows	165	Extortion and Threats	205	Husband and Wife	249	Malicious Prosecution
123	Deposits in Court	166	Extradition and	205H	Implied and Constructive	250	Mandamus
124	Descent and		Detainers		Contracts	251	Manufactures
	Distribution	167	Factors	206	Improvements	252	Maritime Liens
125	Detectives and Security Guards	168	False Imprisonment	207	Incest	253	Marriage
126	Detinue	169	False Personation	208	Indemnity	256	Mayhem
129	Disorderly Conduct	170	False Pretenses	209	Indians	257	Mechanics' Liens
130	Disorderly House	170A	Federal Civil	210	Indictment and	257A	Mental Health
131	District and	1700	Procedure	211	Information	258A	Military Justice
151	Prosecuting		Federal Courts	211	Infants	259	Militia
	Attorneys	171	Fences	212	Injunction	260	Mines and Minerals
132	District of Columbia	172	Ferries	213	Innkeepers	265	Monopolies
133	Disturbance of Public Assemblage	174	Fines	216	Inspection	266	Mortgages
134	Divorce	175	Fires	217	Insurance	267	Motions
135	Domicile	176	Fish	218	Insurrection and Sedition	268	Municipal
	Double Jeopardy	177	Fixtures	219	Interest		Corporations
				-			

269	Names	313	Process	344	Salvage	379	Torts
271	Ne Exeat	313A	Products Liability	345	Schools	380	Towage
272	Negligence	314	Prohibition	346	Scire Facias	381	Towns
273	Neutrality Laws	315	Property	347	Seals	382T	Trademarks
274	Newspapers	315H	Prostitution	348	Seamen	384	Treason
275	New Trial	315P		349	Searches and	385	Treaties
276	Notaries		Endangered Persons	0.40.4	Seizures	386	Trespass
277	Notice	315T	Public Amusement and Entertainment	349A	Secured Transactions	387	Trespass to Try Title
278	Novation	316E	Public Assistance	349B	Securities	388	Trial
279	Nuisance	316H	Public Contracts		Regulation	390	Trusts
280	Oath	317	Public Lands	350	Seduction	391	Turnpikes and Toll
281	Obscenity	317A	Public Utilities	350H	Sentencing and Punishment	392	Roads
282	Obstructing Justice	318	Quieting Title	351	Sequestration		Undertakings
283	Officers and Public	319	Quo Warranto	352	Set-Off and	3921	Unemployment Compensation
284	Employees Pardon and Parole	319H	Racketeer Influenced		Counterclaim	393	United States
285	Parent and Child		and Corrupt Organizations	353	Sheriffs and Constables	394	United States
286	Parliamentary Law	320	Railroads	354	Shipping		Magistrates
287	Parties	321	Rape	355	Signatures	395	United States Marshals
288	Partition	322	Real Actions	356	Slaves	396	Unlawful Assembly
289	Partnership	323	Receivers		Social Security and	396A	Urban Railroads
290	Party Walls	324	Receiving Stolen	3307	Public Welfare	398	Usury
291	Patents		Goods	357	Sodomy	399	Vagrancy
294	Payment	325	Recognizances	358	Specific Performance	400	Vendor and
295	Penalties	326	Records	359	Spendthrifts		Purchaser
296	Pensions	327	Reference	360	States	401	Venue
297	Perjury	328	Reformation of Instruments	361	Statutes	402	War and National Emergency
298	Perpetuities	330	Registers of Deeds	362	Steam	403	Warehousemen
300	Pilots	331	Release	363	Stipulations	404	Waste
302	Pleading	332	Religious Societies	365	Submission of Controversy	405	Water Law
303	Pledges	333	Remainders	366	Subrogation	406	Weapons
305	Possessory Warrant	334	Removal of Cases	367	Subscriptions	407	Weights and
306	Postal Service	335	Replevin	368	Suicide		Measures
307	Powers	336	Reports	369	Sunday	408	Wharves
307A	Pretrial Procedure	337	Rescue	370	Supersedeas	409	Wills
308	Principal and Agent	338	Reversions	371	Taxation	410	Witnesses
309	Principal and Surety	339	Review	372	Telecommunications	411	Woods and Forests
310	Prisons	340) Dowards	373	Tenancy in Common	413	Workers' Compensation
311	Private Roads	341	Riot	374	Tender	414	Zoning and Planning
311H	Privileged	342	Robbery	375	Territories	450	Merit Systems
	Communications and Confidentiality	343	Sales	378	Time	.50	Protection

Searching by West Topic and Key Number

When you have identified a topic and key number associated with the legal issue you are researching, you can run a Terms and Connectors search using that topic and key number to quickly retrieve cases involving the same legal issue. A topic and key number search does not require a field-restricted format; that is, you do not need to include a field name or abbreviation as part of your search request. For example, to search for cases with headnotes classified under topic 343 (Sales) and key number 255 (Parties; Privity), type 343k255.

To narrow your search, add search terms. For example, the query **343k255 /p contract** retrieves cases with headnotes classified under topic 343 and key number 255 that also contain the term *contract* in the same digest paragraph.

Topic field searching

You can also retrieve cases with headnotes classified under a specific West digest topic by using a topic field (to) restriction in your Terms and Connectors search. In addition to the topic name and number, the topic field contains the hierarchical classification information, key number, and text of the related key line. For example, to retrieve cases with headnotes classified under topic 409 (Wills), type to(409) or to(wills). The broader search is to(wills) because it retrieves cases in which the term wills is mentioned in the key line or other levels of the hierarchy, even if the headnotes are not classified under topic 409. To narrow your search, add search terms; for example, type to(409) /p "condition subsequent".

Using the West Key Number Digest (Custom Digest)

The West Key Number Digest, also called the Custom Digest, contains the complete topic and key number outline used by West attorney-editors to classify headnotes. The West Key Number Digest helps you identify topic and key numbers related to your issue and retrieve cases with headnotes classified under those topic and key numbers.

To access the West Key Number Digest, click **Key Numbers** at the top of any page, then click **West Key Number Digest Outline** under *Browse Key Numbers*. (Alternatively, click **Custom Digest** at a case law database Search page.) To browse the digest, click the plus (+) and minus (–) symbols.

In addition to browsing the West Key Number Digest for relevant topic and key numbers, you can also search for them using the Search for Key Numbers feature.

To use the Search for Key Numbers feature, complete these steps:

- 1. Click **Key Numbers** at the top of any page. A page is displayed that contains the *Search for Key Numbers* text box.
- 2. Type your terms, e.g., family and medical leave, in the text box.
- 3. To change the jurisdiction from which you retrieve case headnotes, click **Change Jurisdiction**, then select the check boxes next to the jurisdictions you want and click **Done**.
- 4. Click Search. A list of topic and key numbers is displayed.
- 5. Click a topic and key number to view the headnotes classified under that topic and key number. Or select the check boxes next to one or more topic and key numbers and click **Search Selected** to view the headnotes classified under those topic and key numbers.

Digest Topics by Specialty

	native Dispute	213	Innkeepers	319	Quo Warranto	242	Lis Pendens
	lution	217	Insurance	334	Removal of Cases	250	Mandamus
25T	Alternative Dispute Resolution	224	Joint Adventures	378	Time	267	Motions
76D	Child Custody	289	Partnership	394	United States	271	Ne Exeat
217	Insurance	317A	Public Utilities		Magistrates	275	New Trial
	Labor and	320	Railroads	410	Witnesses	277	Notice
LJIII	Employment	332	Religious Societies		Procedure- e Cases	287	Parties
233	Landlord and Tenant	345	Schools	2	Abatement and	302	Pleading
289	Partnership	372	Telecommunications		Revival	307A	Pretrial Procedure
354	Shipping	396A	Urban Railroads	13	Action	311H	Privileged
Antit	trust		Procedure-	21	Affidavits		Communications and Confidentiality
29T	Antitrust and Trade Regulation	2	eral Cases Abatement and	25T	Alternative Dispute Resolution	313	Process
Bank	cruptcy		Revival	30	Appeal and Error	314	Prohibition
51	Bankruptcy	13	Action	31	Appearance	319	Quo Warranto
117T	Debtor and Creditor	25T	Alternative Dispute Resolution	44	Attachment	322	Real Actions
163	Exemptions	48	Audita Querela	48	Audita Querela	327	Reference
202	Homestead	96	Contribution	73	Certiorari	334	Removal of Cases
349A	Secured	106	Courts	96	Contribution	339	Review
	Transactions	115	Damages	105	Court	346	Scire Facias
	ness and Other Inizations	118A	Declaratory		Commissioners	351	Sequestration
41	Associations	11071	Judgment	106	Courts	352	Set-Off and Counterclaim
52	Banks and Banking	135	Domicile	115	Damages	262	
54	Beneficial	143	Election of Remedies	118A	Declaratory Judgment	363	Stipulations
	Associations	156	Estoppel	123	Deposits in Court	370	Supersedeas
65	Brokers	157	Evidence	135	Domicile	378	Time
66	Building and Loan Associations	158	Exceptions, Bill of	143	Election of Remedies	388	Trial
70	Carriers	170A	Federal Civil	150	Equity	401	Venue
71	Cemeteries		Procedure	156	Estoppel	410	Witnesses mercial Law
75	Charities		Federal Courts	157	Evidence		
		197	Habeas Corpus	158	Exceptions, Bill of	29T	Antitrust and Trade Regulation
80 81	Clubs Colleges and		Injunction	161	Execution	38	Assignments
01	Universities	222	Interpleader	189	Garnishment	51	Bankruptcy
83T	Common Interest	227	Judges	197	Habeas Corpus	52	Banks and Banking
	Communities	228	Judgment	212	Injunction	56	Bills and Notes
101	Corporations and Business	230	Jury	222	Interpleader	70	Carriers
	Organizations	241	Limitation of Actions	227	Judges	76	Chattel Mortgages
108A	Credit Reporting	250	Mandamus	228	Judgment	92B	Consumer Credit
145	Agencies	311H	Privileged Communications	230	Jury	95	Contracts
145	Electricity		and Confidentiality	231	Justices of the Peace	117T	Debtor and Creditor
167	Factors	314	Prohibition	241	Limitation of Actions		
190	Gas			L T1	Ztation of Actions		

186	Fraudulent	1405	Environmental Law	324	Dosoiving Stolen	217 /	Dublic Litilities
100	Conveyances	151	Environmental Law	324	Receiving Stolen Goods	362	Public Utilities Steam
219	Interest		Escape	337	Rescue		
278	Novation	164	Explosives	341	Riot	402	War and National Emergency
294	Payment	165	Extortion and Threats	342	Robbery	Envi	ronmental Law
303	Pledges	166	Extradition and	349	Searches and	23	Agriculture
343	Sales		Detainers		Seizures	145	Electricity
349A	Secured	168	False Imprisonment	350	Seduction	149E	Environmental Law
	Transactions	169	False Personation	350H	Sentencing and Punishment	260	Mines and Minerals
403	Warehousemen	170	False Pretenses	357	Sodomy	279	Nuisance
Com	munications	174	Fines	368	Suicide	405	Water Law
92	Constitutional Law	175	Fires	384	Treason	414	Zoning and Planning
99	Copyrights and Intellectual Property	180	Forfeitures			Esta	te Planning
237	Libel and Slander	181	Forgery	396	Unlawful Assembly	17	Adoption
		184	Fraud	399	Vagrancy	75	Charities
306	Postal Service	193	Grand Jury	406	Weapons	76H	
311H	Privileged Communications	197	Habeas Corpus	410	Witnesses	7011	Wedlock
	and Confidentiality	198H	Health		cation	124	Descent and
372	Telecommunications	203	Homicide	81	Colleges and Universities		Distribution
Crim	inal Justice	207	Incest	345	Schools	136	Dower and Curtesy
18	Adulteration	209	Indians		oloyment Law	154	Estates in Property
19	Adultery	210	Indictment and	78	Civil Rights	162	Executors and Administrators
35	Arrest		Information	81	Colleges and	191	Gifts
36	Arson	211	Infants	01	Universities	220	Internal Revenue
37	Assault and Battery	218	Insurrection and	104	Counties		
55	Bigamy	2245	Sedition	198H	Health	226	Joint Tenancy
63	Bribery		Kidnapping	231H	Labor and	240	Life Estates
67	Burglary	234	Larceny		Employment	298	Perpetuities -
76A	Chemical	248	Malicious Mischief	268	Municipal Corporations	307	Powers
	Dependents	256	Mayhem	283	Officers and Public	333	Remainders
91	Conspiracy	273	Neutrality Laws	203	Employees	338	Reversions
96H	Controlled	281	Obscenity	345	Schools	371	Taxation
0.0	Substances	282	Obstructing Justice	356A	Social Security and	373	Tenancy in Common
98	Convicts	284	Pardon and Parole		Public Welfare	390	Trusts
103	Counterfeiting	297	Perjury	360	States	409	Wills
110	Criminal Law	310	Prisons	381	Towns	Fam	ily Law
129	Disorderly Conduct	311H	Privileged	392T	Unemployment	4	Abortion and Birth
130	Disorderly House		Communications and Confidentiality	202	Compensation	17	Control
131	District and Prosecuting	315H	Prostitution	393	United States	17	Adoption
	Attorneys		Protection of	413	Workers' Compensation	19	Adultery
133	Disturbance of	الداد	Endangered Persons	Energy		55	Bigamy
	Public Assemblage	319H	Racketeer Influenced	145	Electricity	61	Breach of Marriage Promise
135H	Double Jeopardy		and Corrupt Organizations	190	Gas	76D	Child Custody
146	Embezzlement	321	Rape	260	Mines and Minerals		Child Support
		J_ 1	Тарс	200	C3 and Millerats	76E	Cilita Support

76H		257A	Mental Health	231	Justices of the Peace	Real	Property
12.4	Wedlock	315P	Protection of	276	Notaries	6	Abstracts of Title
134	Divorce	lmm	Endangered Persons igration and	327	Reference	7	Accession
136 196	Dower and Curtesy Guardian and Ward	Citiz	enship	394	United States Magistrates	15	Adjoining Landowners
205	Husband and Wife	24	Aliens, Immigration, and Citizenship	Mari	time Law	20	Adverse Possession
207	Incest	Insu	rance	16	Admiralty	59	Boundaries
211	Infants	217	Insurance	82	Collision	65	Brokers
253	Marriage	356A	Social Security and	172	Ferries	66	Building and Loan
285	Parent and Child		Public Welfare	252	Maritime Liens		Associations
315P	Protection of Endangered Persons	392T	Unemployment Compensation	300	Pilots	83T	Common Interest Communities
350	Seduction	413	Workers'	344	Salvage	84	Common Lands
Fina	ncial Institutions	Intel	Compensation lectual Property	348	Seamen	108	Covenants
52	Banks and Banking	29T	Antitrust and Trade	354	Shipping	119	Dedication
66	Building and Loan	231	Regulation	405	Water Law	120	Deeds
00	Associations	99	Copyrights and	408	Wharves	141	Easements
92B	Consumer Credit		Intellectual Property	Med		142	Ejectment
108A	Credit Reporting	291	Patents		Health	148	Eminent Domain
047	Agencies		Trademarks		icare	149	Entry, Writ of
217	Insurance		national Issues		Health	149T	Equitable
	ernment	24	Aliens, Immigration, and Citizenship		ary Law		Conversion
64	Bridges	26	Ambassadors and	34	Armed Services	154	Estates in Property
81	Colleges and Universities		Consuls		Military Justice	171	Fences
104	Counties	114	Customs Duties	259	Militia	177	Fixtures
132	District of Columbia	221	International Law	402	War and National Emergency	179	Forcible Entry and Detainer
200	Highways	385	Treaties	Prod	lucts Liability	206	Improvements
268	Municipal	402	War and National Emergency	145	Electricity	233	Landlord and Tenant
2165	Corporations	Juve	nile Justice	164	Explosives	238	Licenses
	Public Assistance	211	Infants	178	Food	239	Liens
	Public Contracts	Lega	l Services	190	Gas	242	Lis Pendens
345	Schools	12	Acknowledgement	313A	Products Liability	257	Mechanics' Liens
360 375	States Territories	25T	Alternative Dispute		essional oractice	266	Mortgages
			Resolution	11A	Accountants	272	Negligence
381	Towns	45	Attorney and Client	45	Attorney and Client	288	Partition
393	United States	46	Attorney General	65	Brokers	290	Party Walls
405 Heal	Water Law	79	Clerks of Courts		Health	311	Private Roads
76A		105	Court Commissioners	211	Infants	315	Property
	Dependents	106	Courts		Mental Health	315T	Public Amusement and Entertainment
96H	Controlled Substances	131	District and	272	Negligence	317	Public Lands
198H	Health		Prosecuting Attorneys	332	Religious Societies	318	Quieting Title
		227	Judges	345	Schools		-

322	Real Actions	238	Licenses	178	Food	406	Weapons
330	Registers of Deeds	268	Municipal	179	Forcible Entry and	Trans	sportation
338	Reversions		Corporations		Detainer	16	Admiralty
358	Specific Performance	345	Schools	184	Fraud	48A	Automobiles
386	Trespass	371	Taxation	190	Gas	48B	Aviation
387	Trespass to Try Title	381	Towns	198H	Health	64	Bridges
400	Vendor and	Torts	5	213	Innkeepers	70	Carriers
	Purchaser	37	Assault and Battery	233	Landlord and Tenant	82	Collision
405	Water Law	45	Attorney and Client	237	Libel and Slander	83	Commerce
414	Zoning and Planning	48A	Automobiles	249	Malicious	172	Ferries
	urities and	48B	Aviation		Prosecution	200	Highways
	ımodities ulations	52	Banks and Banking	272	Negligence	320	Railroads
83H	Commodity Futures	70	Carriers	279	Nuisance		
	Trading Regulation	78	Civil Rights	313A	Products Liability		Seamen
160	Exchanges	97C	Conversion and Civil	315T	Public Amusement and Entertainment	354	Shipping
349E	3 Securities		Theft	222		391	Turnpikes and Toll Roads
.	Regulation	115	Damages	320	Railroads	3964	Urban Railroads
Taxa		117	Death	350	Seduction	405	Water Law
83	Commerce	145	Electricity	354	Shipping		nployment
104	Counties	164	Explosives	379	Torts		oensation
220	Internal Revenue	168	False Imprisonment	386	Trespass	392T	Unemployment
223	Intoxicating Liquors		•	404	Waste		Compensation



EXHIBIT 111

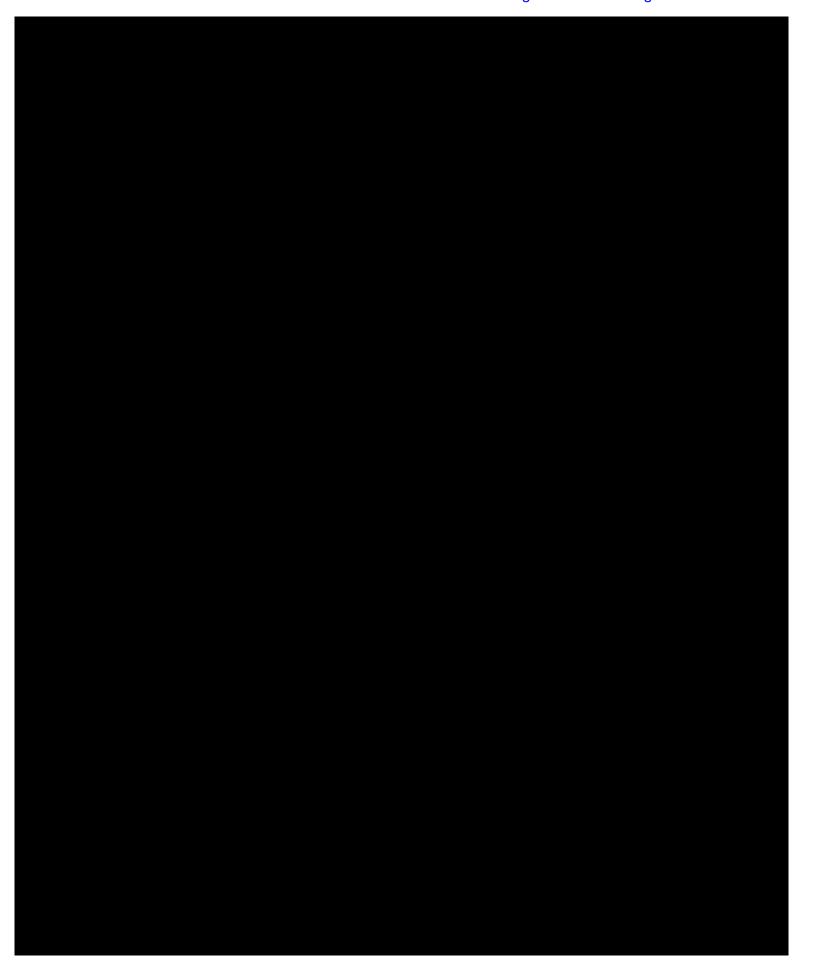




EXHIBIT 112

163 N.C. 356 Supreme Court of North Carolina.

LATHAM

v.

FIELD et al.

Nov. 5, 1913.

Synopsis

Appeal from Superior Court, Guilford County; Peebles, Judge.

Action by J. E. Latham against J. E. Field and another. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

West Headnotes (3)

[1] Principal and Agent Principal Representation of Principal

308 Principal and Agent

308III Rights and Liabilities as to Third Persons

308III(A) Powers of Agent

308k91 Representation of Principal

308k92 In General

308k92(1) In General

The acts of an agent performed within the scope of his real or apparent authority are binding on his principal.

7 Cases that cite this headnote

[2] Principal and Agent Agent's Acts in General

308 Principal and Agent

308III Rights and Liabilities as to Third Persons

308III(A) Powers of Agent

308k130 Liabilities Incurred

308k131 Agent's Acts in General

A principal is as liable for damages from acts performed through an agent as if he had done them himself.

1 Cases that cite this headnote

[3] Principal and Agent Puestions for Jury

308 Principal and Agent

308III Rights and Liabilities as to Third Persons

308III(F) Actions

308k191 Trial

308k193 Questions for Jury

In an action for breach of a contract for the sale of cotton, made through a third person, evidence on the question of the defendant's liability as principal held sufficient to go to the jury.

1 Cases that cite this headnote

*865 This case was before us at Fall term, 1912, and is reported in 160 N. C. 335, 76 S. E. 251. The facts, as they now appear, are somewhat different from those there stated. Plaintiff testified: That W. H. Field, one of the defendants, called at his place of business in April, 1908, and showed him some samples of cotton, stating that J. D. Turner would thereafter represent his firm in that territory as their broker, and he hoped defendants would send them some business through Mr. Turner. That about three weeks after the conversation, plaintiff ordered some cotton from the defendants through Turner, buying 100 bales of strict low middling from defendants through Turner, at 10 1/6 cents per pound. Plaintiff paid for the cotton at that price, although it proved to be of a very low and inferior quality, below any known grade, and what is called in the trade "Junk." The difference in value of the two kinds is 2 cents per pound, and the quantity 46.493 pounds. That he had no further communication with defendants, personally or by letter, after the time of the conversation until the cotton had been shipped and received. He ordered the cotton through Turner, and at first wanted 200 bales, but Turner told him that he could only get 100 bales of the required grade, and that he had secured it from defendants. The cotton was shipped to defendants, Greensboro, N. C., "order notify J. D. Turner," and the bill of lading showed that the cotton was shipped by defendants to their own order, and indorsed by them. J. D. Turner drew the draft for the price, and plaintiff paid it at bank and took up the bill of lading. Draft was signed by Turner and drawn at Greensboro, N. C., and not by Field & Co. at their home in Cartersville, Ga., as if it had originated there. Cotton is very often shipped through the South to the order of a bank cashier or some clerk in a merchant's office. "As to whose name is on a bill of lading, that is a thing we don't look at. It is who is the shipper of the cotton and whose name is indorsed on

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the back that makes it negotiable." That he never found out what disposition was made of the proceeds of his payment for the cotton. That he paid the draft, and took the bill of lading to the railway company and got the cotton. He received the following letter confirming the trade:

"Our order No. -. Greensboro, N. C., 5-11-1908. Messrs. J. E. Latham, Greensboro, N. C.-Dear Sirs: We hereby confirm the following sale made you this day: 100 bales cotton, grade, strict low middling, at 10 1/6 c. per lb., landed at Group A, for shipment prompt, for the account of J. E. Field & Son. Remarks: Shipped by J. E. Field & Son, Cartersville, Ga. Yours truly, Jno. D. Turner, Jr.

"N. B. In any case of reference to this order, please give our order number, subject to Carolina mill rules."

On the cross and re-examination, plaintiff testified: "Mr. Latham, in June 19, 1908 you addressed a letter to Field & Co., which I have just shown you, and you told them about this offer you had received from the Riverside Cotton Mills of 10 cents? Answer: Yes, sir." Plaintiff did not address this communication to the defendants for the purpose of connecting them with the original sale, or for the purpose of getting some reply from defendants in order to connect them with the original sale. Plaintiff's reason for so writing the defendant was that cotton is sold in this territory, including Danville and all the territory around Greensboro, under what is known as the Carolina mill rules. These rules provide that when a shipment of cotton is received, if it is below grade as originally contracted for, it may be rejected by the buyer. Our position on this cotton all the time was that Field & Co. had not performed their contract; that they had shipped something we did not buy, and, so far as we were concerned, we rejected it. We were holding the cotton, waiting for them to replace the contract with the proper grade of cotton which *866 we had bought and which we had paid for. When he paid the draft drawn by Turner, for some \$4,600, he knew that the draft had been drawn in Greensboro. He knew that a draft drawn by Field & Co. on him would have originated in Cartersville, Ga. In the former trial he testified that the cotton shipped was very difficult to grade, but in his opinion it would average about strict low middling. Cotton that is full of dust and sand is not merchantable, and for that reason is not gradable cotton. When cotton is bought, it is customary to confirm it. In this instance no confirmation was sent to the defendants, for the reason that plaintiff received a confirmation from J. D. Turner. Plaintiff confirmed the purchase to Turner. It is customary in the cotton trade to confirm either to the vendor or his agent. The sample exhibited to witness is a sample

of strict low middling cotton. The sale in controversy was confirmed to plaintiff by J. D. Turner for the account of the defendants. Cotton arrives several days later than drafts, and in this instance the draft was presented and paid by plaintiff probably seven days before the arrival of the cotton. Plaintiff had no opportunity to examine the cotton before he paid the draft. That is the usual custom in the trade. He paid the draft upon the faith of the contract he had with Mr. Turner as broker for J. E. Field & Son, and upon the fact that it was attached to the bill of lading showing J. E. Field & Son, of Cartersville, Ga., were the shippers of the cotton, and that J. E. Field & Son, in order to make the bill of lading negotiable, had indorsed it on the back. He would not have paid the draft unless the bill of lading had been attached. The paper shown him is the confirmation he received at the time he bought the 100 bales of cotton in controversy.

The bill of lading was introduced. It was of the standard form, issued at Cartersville, Ga., by the railroad company to J. E. Field & Son, and contained the following: "Shippers' order notify. Consignee, J. D. Turner, Jr." -and was indorsed by J. E. Field & Son and J. D. Turner, Jr. There was more evidence as to the damages, not necessary to be stated. At the close of the plaintiff's testimony, the judge ordered a nonsuit, upon defendants' motion, and plaintiff appealed.

Attorneys and Law Firms

Thos. S. Beall and King & Kimball, all of Greensboro, for appellant. Douglass & Douglass, of Raleigh, J. T. Norris, of Cartersville, and R. C. Strudwick, of Greensboro, for appellees.

Opinion

WALKER, J. (after stating the facts as above).

[1] [2] The nonsuit requires us to consider the evidence in the most favorable view for the plaintiff. Plaintiff contends that he acted upon the representation of W. H. Field that J. D. Turner was the broker of defendants, and therefore fully authorized to make contracts for the sale of cotton in their behalf, and that he was dealing with Turner as agent, and not in his individual capacity, and relied upon the statement of W. H. Field that he could so deal in the future. The rule in regard to agency may be thus stated: A principal is bound by the acts of his agent within the authority he has actually given him, which includes not only the precise act which he expressly authorizes him to do, but also whatever usually belongs to the doing of it, or is necessary to its performance. Beyond that he is liable for the acts of the agent within the appearance of

authority which the principal himself knowingly permits the agent to assume, or which he holds the agent out to the public as possessing. For the acts of his agent, within his express authority, the principal is liable because the act of the agent is the act of the principal. For the acts of the agent, within the scope of his authority he holds the agent out as having, or knowingly permits him to assume, the principal is made responsible because to permit him to dispute the authority of the agent in such cases would be to enable him to commit a fraud upon innocent persons. Bank v. Hay, 143 N. C. 326, 55 S. E. 811; Law v. Stokes, 32 N. J. Law, 249, 90 Am. Dec. 655; Mechem on Agency, § 84. "The principal is bound by all the acts of his agent within the scope of the authority which he holds him out to the world to possess, although he may have given him more limited private instructions, unknown to the persons dealing with him; and this is founded on the doctrine that where one of two persons must suffer by the act of a third person, he who has held that person out as worthy of trust and confidence, and as having authority in the matter, shall be bound by it. Carmichael v. Buck, 10 Rich. (S. C.) 332, 70 Am. Dec. 226; Story on Agency, § 127. "Where a person by words or conduct represents or permits it to be represented that another person is his agent, he will be estopped to deny the agency, as against third persons who have dealt, on the faith of such representation, with the person so held out as agent, even if no agency existed in fact." Trollinger v. Fleer, 157 N. C. 81, 72 S. E. 795; Metzger v. Whitehurst, 147 N. C. 171, 60 S. E. 907. These cases fairly illustrate this doctrine and define its limits. As to the liability of a principal acting through a broker, see 19 Cyc. 292. The court, in this case, when formerly here (160 N. C. 335, 76 S. E. 251), stated the duties of a broker and the nature of his agency.

[3] [4] The case may be considered in two aspects: (1) Was Turner in fact acting as defendant's broker in the transaction? (2) Did defendants, by W. H. Field, induce the plaintiff to believe that Turner had authority to represent them in selling their cotton, and thereby lead him to make the order for the 100 bales, he believing, and having reason to believe, under the circumstances, that *867 they were selling, not to Turner for himself, but through him to the plaintiff? If the jury should find that Turner was really acting as agent or broker for the defendants, they would be liable for the damages sustained by the plaintiffs, for the defendants would, in such case, be the principals, and the acts of Turner, though in his own name, would be imputable to them as much so as if they had acted for themselves, instead of by representation. The form of the transaction is not material. Holt v. Wellons, 79 S. E. 450 at this term. We think there was evidence to support either of these theories. In the first place, the plaintiff testifies, without qualification, that "he got the cotton from the defendants through Turner," and thus he did precisely what W. H. Field told him to do. It also appears that Turner told the plaintiff that he had succeeded in getting the cotton for them from defendants. In the letter of confirmation it is stated that "the sale was made for the account of J. E. Field & Son," and Turner opens his letter by saying: "We hereby confirm the sale, and request plaintiff, in case of any reference to the order, to give our order number." Plaintiff might well argue, and the jury be authorized to find, that Turner, by the use of this language, was not referring merely to himself, but to Field & Co., or to them, and to himself as their agent. Turner knew of the conversation that W. H. Field had with the plaintiff, for he was present, and it might reasonably be inferred by the jury that, as he had not disavowed his agency, or notified plaintiff to the contrary, up to the time of the purchase, he was acting for them in accordance with the understanding at the April meeting. The plaintiff testified that cotton is very often shipped to the order of a bank cashier or some clerk in a merchant's office. The name on the bill of lading is disregarded -they look for the shipper of the cotton and the indorsement on the bill. This was an explanation of the form of the bill of lading, and a reason why the request to notify J. D. Turner of the shipment did not necessarily disprove his agency, or establish the fact that defendants were dealing with him as a principal in the transaction and as a purchaser of the cotton, and its consignee, on his own account. If by the conduct of W. H. Field, or the defendants the plaintiff was reasonably led to believe that Turner was acting as their broker, and by reason thereof he dealt with him as such, relying upon such conduct and believing in good faith that Turner was acting as broker and not for himself, it would be the same as if he was, in fact, the broker of defendants in selling the cotton. The jury may consider whether Turner was in fact defendants' broker, and in the bill of lading they requested that he be notified individually of the shipment, merely for their convenience or in accordance with the custom, or whether they thereby intended to deal with him individually, and not as their broker, or whether they used his name, meaning that he should be their broker, without regard to the fact that he was not addressed as such, and knowing that he had been so represented to the plaintiff. These are merely suggestions as to the different views of the evidence, and must not be taken as an intimation upon the weight or sufficiency of the same to establish either side of the case.

It would serve no practical purpose to further consider the evidence as bearing upon the question of an agency in fact or

in law. It is sufficient to say that, as the case is now presented to us, there is evidence fit to be submitted to the jury and to warrant a finding thereon in favor of the plaintiff, under proper instructions from the court as to the law.

New trial.

All Citations

There was error in granting the nonsuit. It will be set aside, and a new trial is ordered.

163 N.C. 356, 79 S.E. 865

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EXHIBIT 113

2017 IL App (2d) 160554 Appellate Court of Illinois, Second District.

IN RE Parentage of J.W., a Minor (Carol M., Petitioner-Appellant,

Larry W., Respondent-Appellee).

No. 2-16-0554 | Opinion filed April 28, 2017

Synopsis

Background: During parentage action, mother filed a third motion seeking interim attorney fees. The Circuit Court of Du Page County, No. 01-F-424, Timothy J. McJoynt, J., dismissed the motion. Mother appealed.

Holdings: The Appellate Court, McLaren, J., held that:

- [1] mother forfeited her right to a hearing on her first and second motions for interim attorney fees;
- [2] the trial court was required to conduct a hearing on mother's motion for attorney fees from father.

Reversed and remanded.

Procedural Posture(s): On Appeal; Motion to Dismiss.

West Headnotes (11)

[1] Parent and Child - Attorney fees

285 Parent and Child

285II Proceedings to Determine Parentage

285II(A) In General

285k186 Costs

285k188 Attorney fees

Mother forfeited her right to a hearing on her first and second motions for interim attorney fees, in parentage action, where mother never asked the trial court for a hearing date on either her first or second motion for interim attorney fees. 750 Ill. Comp. Stat. Ann. 5/508(a), 501(c)-1).

[2] Statutes 🐎 Intent

361 Statutes

361III Construction

361III(A) In General

361k1071 Intent

361k1072 In general

The primary rule of statutory construction is to give effect to the intent of the legislature.

[3] Statutes 🌦 Language and intent, will,

purpose, or policy

Statutes ← Plain Language; Plain, Ordinary, or Common Meaning

361 Statutes

361III Construction

361III(A) In General

361k1078 Language

361k1080 Language and intent, will, purpose, or policy

361 Statutes

361III Construction

361III(B) Plain Language; Plain, Ordinary, or

Common Meaning

361k1091 In general

The most reliable indicator of legislative intent is the statutory language itself, which must be given its plain and ordinary meaning when construing a statute.

[4] Appeal and Error • Statutory or legislative

30 Appeal and Error

30XVI Review

30XVI(D) Scope and Extent of Review

30XVI(D)2 Particular Subjects of Review in

General

30k3169 Construction, Interpretation, or

Application of Law

30k3173 Statutory or legislative law

(Formerly 30k893(1))

The Appellate Court reviews de novo issues of statutory construction.

[5] Costs, Fees, and Sanctions Waiver and correction of irregularities and errors

102 Costs, Fees, and Sanctions

102III Awards of Costs and Fees 102III(G) Proceedings to Award; Taxation 102k898 Waiver and correction of irregularities and errors

(Formerly 102k208)

While it is true that a party who requests a hearing on attorney fees must be given one, the failure to request such a hearing results in a forfeiture of one's right to the hearing.

[6] Pretrial Procedure - Insufficiency in general

307A Pretrial Procedure 307AIII Dismissal 307AIII(B) Involuntary Dismissal 307AIII(B)4 Pleading, Defects In, in General

307Ak622 Insufficiency in general

A motion to dismiss challenges only the legal sufficiency of the complaint. 735 Ill. Comp. Stat. Ann. 5/2-615.

[7] **Pretrial Procedure** \leftarrow Construction of pleadings

307A Pretrial Procedure 307AIII Dismissal

307AIII(B) Involuntary Dismissal

307AIII(B)6 Proceedings and Effect

307Ak679 Construction of pleadings

When reviewing a motion to dismiss, the critical inquiry is whether the allegations of the complaint, when considered in the light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted. 735 Ill. Comp. Stat. Ann. 5/2-615.

1 Cases that cite this headnote

Pretrial Procedure \hookrightarrow Well-pleaded facts [8]

Pretrial Procedure 🐎 Matters not admitted

307A Pretrial Procedure

307AIII Dismissal

307AIII(B) Involuntary Dismissal

307AIII(B)6 Proceedings and Effect

307Ak686 Matters Deemed Admitted

307Ak687 Well-pleaded facts

307A Pretrial Procedure

307AIII Dismissal

307AIII(B) Involuntary Dismissal

307AIII(B)6 Proceedings and Effect

307Ak689 Matters not admitted

For the purpose of a motion to dismiss, all wellpled facts in the complaint must be taken as true, but conclusions of law will not be taken as true unless supported by specific factual allegations. 735 Ill. Comp. Stat. Ann. 5/2-615.

1 Cases that cite this headnote

Appeal and Error - De novo review [9]

30 Appeal and Error

30XVI Review

30XVI(D) Scope and Extent of Review

30XVI(D)3 Procedural Matters in General

30k3196 Dismissal and Nonsuit in General

30k3200 De novo review

(Formerly 30k893(1))

The dismissal of a complaint is reviewed de novo. 735 Ill. Comp. Stat. Ann. 5/2-615.

Attorneys and Legal Services 🐎 Third [10]

parties; non-clients

Parent and Child Attorney fees

46H Attorneys and Legal Services

46HVII Compensation of Attorney

46HVII(A) In General

46Hk250 Persons Liable

46Hk252 Third parties; non-clients

(Formerly 45k133 Attorney and Client)

285 Parent and Child

285II Proceedings to Determine Parentage

285II(A) In General

285k186 Costs

285k188 Attorney fees

Statute governing final hearings for attorney fees and costs against an attorney's own client, which required a written fee agreement between attorney and client, did not preclude attorney for mother from seeking attorney fees from father, in parentage action, even though there was no written fee agreement between mother and attorney, where statute only applied to an attorney's action seeking attorney fees from his or her own client, not the opposing party. 750 Ill. Comp. Stat. Ann. 5/508(c).

[11] Attorneys and Legal Services Third parties; non-clients

Parent and Child - Attorney fees

46H Attorneys and Legal Services

46HVII Compensation of Attorney

46HVII(A) In General

46Hk250 Persons Liable

46Hk252 Third parties; non-clients

(Formerly 45k133 Attorney and Client)

285 Parent and Child

285II Proceedings to Determine Parentage

285II(A) In General

285k186 Costs

285k188 Attorney fees

The trial court was required to conduct a hearing on mother's motion for attorney fees from father, in parentage action, even though there was no written fee agreement between mother and attorney; attorney for mother had a right to seek contribution from father for attorney fees under the Parentage Act. 750 Ill. Comp. Stat. Ann. 5/503(j), 508(a,c).

*735 Appeal from the Circuit Court of Du Page County, No. 01-F-424, Honorable Timothy J. McJoynt, Judge, Presiding.

Attorneys and Law Firms

Jerry W. Kinnan, of Jerry Kinnan Ltd., of Addison, for appellant.

Elizabeth M. Westover and Kerry M. Born, of Westover Born, P.C., of Chicago, for appellee.

OPINION

JUSTICE McLAREN delivered the judgment of the court, with opinion.

**130 ¶ 1 During the proceedings in this parentage action, originally filed under the Illinois Parentage Act of 1984 (Parentage Act of 1984) (750 ILCS 45/1 et seq. (West 2008)), attorney Jerry Kinnan filed three motions for "Interim Attorney Fees" on behalf of his client, petitioner Carol M., seeking fees from respondent Larry W. The trial court dismissed Carol's third motion for interim attorney fees on

the grounds that she was actually seeking contribution for final attorney fees and that Carol and Kinnan did not have a written engagement agreement. Carol appeals the trial court's dismissal of her third motion for interim attorney fees. Carol argues that the trial court erred by (1) failing to expeditiously schedule a hearing on her first two motions for interim attorney fees, and (2) determining that a written engagement agreement was required. We reverse and remand for further proceedings consistent with this opinion.

¶ 2 I. BACKGROUND

- ¶ 3 In this parentage case, the parties are the parents of J.W., born in 2001. Larry signed a voluntary acknowledgment of paternity two days after J.W.'s birth. After Carol petitioned for child support in 2002, the trial court ordered Larry to pay child support. This case has been litigated continuously with the assistance of many *736 **131 attorneys throughout the years. We will concern ourselves with the most recent events.
- ¶ 4 From the time of J.W.'s birth, J.W. has lived with Carol. However, in August 2015, J.W. began living with his godparents after Carol allegedly threatened to kill J.W. and herself and was taken to a nearby hospital, where she remained for several days.
- ¶ 5 In September 2015, Larry filed a "Petition to Modify Custody, to Remove Child to Maryland, and for other Relief," alleging that since the entry of an agreed parenting order there had been a substantial change in circumstances, arising from the events of August 2015. On September 21, 2015, Kinnan filed his appearance on behalf of Carol. On September 28, 2015, the trial court appointed a guardian *ad litem* (GAL). On October 19, 2015, Carol filed a response to Larry's petition. On October 22, 2015, Carol filed a motion to modify child support.
- ¶6 On November 2, 2015, Carol, by and through Kinnan, filed her first motion for interim attorney fees, pursuant to sections 501(c-1) and 508 of the Illinois Marriage and Dissolution of Marriage Act (Marriage Act) (750 ILCS 5/501(c-1), 508 (West 2014)) and section 17 of the Parentage Act of 1984 (750 ILCS 45/17 (West 2014)).
- ¶ 7 In her motion, Carol alleged that (1) Kinnan had expended 23.5 hours on behalf of Carol since his appearance, (2) Carol owed Kinnan \$7222 for attorney fees and costs, and (3) Kinnan estimated that there would be an additional \$8000

in attorney fees and costs. Of note, Carol alleged that she and "Counsel have been unable to come to an agreement on the amount of legal fees that [Carol] is willing to pay Counsel. Accordingly, Counsel, as the real party in interest, must therefore, seek legal fees on a *quantum meruit* basis." Both Kinnan and Carol attached affidavits to the motion.

- ¶ 8 On February 29, 2016, Carol, by and through Kinnan, filed her second motion for interim attorney fees. Kinnan's attached affidavit alleged that Carol owed him \$14,464 for legal services rendered, and he sought an additional \$5000 for legal services he anticipated Carol would incur. Carol's notice of motion indicated that she would present her motion to the court on March 3, 2016.
- ¶ 9 On March 3, 2016, at the beginning of the call, the trial court listed all of the open motions, including Larry's motion to modify "custody," now renamed "parental allocation," and his motion for "removal," now renamed "relocation"; the GAL's motion to quash Carol's subpoena of J.W.; Carol's first motion for interim attorney fees; and Carol's second motion for interim attorney fees, which the court stated had been filed that day. The court heard the GAL's motion to quash Carol's subpoena, which it granted, and then proceeded to a hearing on Larry's motion to modify the allocation of parental responsibilities. The record does not contain a transcript of the remainder of the call that day.
- ¶ 10 On March 8, 2016, Carol, by and through Kinnan, filed her third motion for interim attorney fees. Carol alleged the following. Thus far, Kinnan had expended 71.15 hours in representing Carol and, based on *quantum meruit*, was owed \$21,385 for attorney fees and costs. Kinnan estimated an additional \$2500 in attorney fees and costs. Carol also alleged that she had previously filed two motions for interim attorney fees, which were presented to the court on December 3, 2015, and March 3, 2016, and remained pending and undetermined.
- \P 11 Kinnan attached his affidavit, wherein he averred, in part, the following:
 - *737 **132 "2. [Carol] * * * engaged my law firm * * * to represent [her] in her ongoing custody dispute with [Larry] on September 19, 2015.
 - 3. [Kinnan] provided valuable legal services to Carol including drafting numerous pleadings, researching legal matters, consulting with [Carol,] and representing [Carol in court on several occasions.]

- 4. [Carol] and Counsel have been unable to come to a meeting of the minds regarding the hourly rate that [Carol] is to be charged for legal services rendered. I informed [Carol] that my hourly billing rate is \$300.00. However, [Carol] has indicated that she is unable to pay Counsel for legal services rendered nor is she able to pay for her court ordered GAL fees.
- 5. [Carol] has not paid me a retainer fee nor has she paid me any amount towards the accrued and unpaid legal fees.
- 6. Counsel is <u>not</u> providing [Carol] any legal services on a pro bono basis and Counsel has so informed [Carol] that he is not working pro bono and that he wants to be paid for legal services rendered.
- 7. Notwithstanding that [Carol] is apparently unable to pay Counsel for services rendered and there has been no meeting of the minds regarding legal fees [Carol] must pay, Counsel is nevertheless entitled to be paid for services rendered on a *quantum meruit* basis. [Citation.]
- 8. *Quantum meruit* literally mean 'as much as he deserves.'
- ¶ 12 In addition, Carol attached her affidavit to her third motion for attorney fees, wherein she averred, in part, the following:
 - "2. I met with [Kinnan] * * * on September 19, 2015, to discuss with him [Larry's] custody and removal petitions that were pending before the court. I asked Counsel to represent me in the custody disputes.
 - 3. I informed Counsel that I could not pay him a retainer fee, but that I would try to pay him for the legal services that he would render on my behalf. Counsel informed me that he was not going to represent me *pro bono* and that he wanted to be paid for services rendered. Counsel and I have not agreed on an hourly rate that Counsel would charge for services rendered. Counsel informed me that his billing rate is \$300.00 per hour.
 - 4. Due to my limited financial resources, I have not paid Counsel a retainer fee or any fees for the services that he has rendered and I do not have the financial resources to pay for Counsel's legal services.

* * *

TR-0743446

- 8. Counsel has sent me an invoice indicating that I currently owe him in excess of \$21,000 for the legal services that he has rendered to date.
- 9. I do not have the financial wherewithal to pay Counsel the legal fees that he is owed."
- ¶ 13 Carol noticed her third motion for interim attorney fees for presentment to the court on March 11, 2016.
- ¶ 14 On March 11, 2016, in a written order, the trial court granted Larry's petition to modify the allocation of parental responsibilities, "transferring allocation of parental responsibility from [Carol] to [Larry]." The trial court further granted Larry "sole authority over all parental responsibilities." The trial court also stated that Larry's petition for permanent relocation of J.W. to Maryland was granted "by *738 **133 agreement," and, "[u]nder separate order, the parties will enter into an Agreed Order regarding parenting time * * * to be presented for review [and] entry by this Court on March 21, 2016." Finally, the trial court granted Larry 21 days to respond to Carol's third motion for fees and granted the parties 21 days to respond to the GAL's fee petition. The trial court set a hearing on fees for April 18, 2016.
- The trial court set forth its findings regarding Larry's petition to modify the allocation of parental responsibilities in a separate written "Opinion & Order" dated March 11, 2016.
- ¶ 15 On March 24, 2016, the trial court entered an "Agreed Final Order" providing for Larry to relocate J.W. to Maryland and for Carol to have parenting time with J.W. On April 12, 2016, the trial court entered an "Agreed Order" setting the case for hearing on May 11, 2016, on "all fee petitions outstanding."
- ¶ 16 On May 4, 2016, Larry filed a "Motion to Strike and Dismiss [Carol's] Third Motion for Interim Attorneys [sic] Fees" pursuant to section 2-615(b) of the Code of Civil Procedure (Code) (735 ILCS 5/2-615(b) (West 2014)). Larry alleged that Carol's motion was insufficient at law because (1) she cited to "750 ILCS 45/802(a)," which does not exist, and "750 ILCS 5/501(c-1)," which does not apply to parentage cases, and (2) Carol did not sign a retainer agreement with Kinnan; she did not want to "contractually obligate herself to pay any amount of fees to [Kinnan]." Kinnan knew this yet "agreed to file an Appearance on behalf of Carol." There

was no contract between Carol and Kinnan; therefore, their relationship "appears to be a *pro bono* relationship, as there was no reasonable expectation for payment from [Carol]."

- ¶ 17 On June 14, 2016, the trial court granted Larry's motion to dismiss Carol's third motion for interim attorney fees. The trial court ruled, under the Illinois Parentage Act of 2015 (Parentage Act of 2015) (Pub. Act 99-85 (eff. Jan. 1, 2016) (adding 750 ILCS 46/101 et seq.)) and In re Minor Child Stella, 353 Ill.App.3d 415, 288 Ill.Dec. 889, 818 N.E.2d 824 (2004), that a "motion for interim fees is certainly allowable in a paternity action. The difficulty, of course comes in the provisions of the Illinois Marriage and Dissolution of Marriage Act, and specifically section 5/508[(c)] which requires an agreement, a written engagement agreement as a prerequisite to a final hearing for attorney's fees and court costs. But it's not a prerequisite to interim fees." The trial court also stated that Carol's "Third Motion for Interim Attorney Fees" was actually a motion for contribution for final attorney fees pursuant to section 503(j) of the Marriage Act (750 ILCS 5/503(j) (West 2014)). The trial court further stated that "without a written agreement in this case between Carol and Mr. Kinnan, I have to grant the motion to dismiss."
- ¶ 18 On July 8, 2016, Carol filed a notice of appeal.

¶ 19 II. ANALYSIS

- [1] ¶ 20 Carol argues that the trial court failed to schedule a hearing on her first and second motions for interim attorney fees expeditiously, pursuant to 501(c-1)(1) of the Marriage Act (750 ILCS 5/501(c-1)(1) (West 2014)).
- ¶ 21 We begin by noting that effective January 1, 2016, the legislature repealed the Illinois Parentage Act of 1984 (750 ILCS 45/1 *et seq.* (West 2014)) and replaced it with the Parentage Act of 2015 (Pub. Act 99-85 (eff. Jan. 1, 2016) (adding 750 ILCS 46/101 *et seq.*)).
- ¶ 22 Carol filed her first motion for interim attorney fees on November 2, 2015, her second motion for interim attorney fees on February 29, 2016, and her third motion for interim attorney fees on March 8, 2016. Therefore, when Carol filed her second and third motions the Parentage *739 **134 Act of 2015 was in effect. However, after reviewing the language of the relevant sections of the Parentage Act of 1984 and the Parentage Act of 2015, we determine that the timing

of the filing of Carol's motions does not affect our decision here.

[2] is to give effect to the intent of the legislature. Hayashi v. Illinois Department of Financial & Professional Regulation, 2014 IL 116023, ¶ 16, 388 III.Dec. 878, 25 N.E.3d 570. The most reliable indicator of legislative intent is the statutory language itself, which must be given its plain and ordinary meaning. Id. We review de novo issues of statutory construction. Id.

¶ 24 Section 17 of the Parentage Act of 1984, relating to costs, provided:

"[T]he court may order reasonable fees of counsel, experts, and other costs of the action, pre-trial proceedings, postjudgment proceedings to enforce or modify the judgment, and the appeal or the defense of an appeal of the judgment, to be paid by the parties in accordance with the relevant factors specified in Section 508 of the Illinois Marriage and Dissolution of Marriage Act * * *." (Emphases added.) 750 ILCS 45/17 (West 2014).

¶ 25 Similarly, section 809(a) of the Parentage Act of 2015, relating to the right to counsel, provides:

"[T]he court may order, in accordance with the relevant factors specified in Section 508 of the Illinois Marriage and Dissolution of Marriage Act, reasonable fees of counsel, experts, and other costs of the action, pre-trial proceedings, post-judgment proceedings to enforce or modify the judgment, and the appeal or the defense of an appeal of the judgment to be paid by the parties." (Emphases added.) 750 ILCS 46/809(a) (West Supp. 2015).

¶ 26 Thus, both section 17 of the Parentage Act of 1984 (750 ILCS 45/17 (West 2014)) and section 809(a) of the Parentage Act of 2015 (750 ILCS 46/809(a) (West Supp. 2015)) provide that, in a parentage action, the court may order reasonable fees of counsel and costs to be paid by the parties "in accordance with the relevant factors specified in Section 508 of the Illinois Marriage and Dissolution of Marriage Act." (Emphasis added.) Accordingly, both sections are essentially the same for our purposes here. Therefore, the timing of the filing of Carol's motions for interim attorney fees is not relevant to our analysis in this case.

¶ 27 Neither section 17 of the Parentage Act of 1984 nor section 809(a) of the Parentage Act of 2015 uses the

words "interim fees," but the sections refer to payment of "reasonable fees of counsel" for every stage of the proceedings, and then the sections direct the court to the [3] [4] ¶23 The primary rule of statutory construction "relevant factors specified in Section 508" of the Marriage Act.

¶ 28 Section 508 of the Act provides:

"(a) The court from time to time, after due notice and hearing, and after considering the financial resources of the parties, may order any party to pay a reasonable amount for his own or the other party's costs and attorney's fees. Interim attorney's fees and costs may be awarded from the opposing party, in a pre-judgment dissolution proceeding in accordance with subsection (c-1) of Section 501 [(750 ILCS 5/501)] * * *." (Emphasis added.) 750 ILCS 5/508(a) (West 2014).

Thus, section 508 does not specify any relevant factors. Instead, it points to section 501(c-1) for the way "interim attorney's fees and costs may be awarded from the opposing party." Id.

¶ 29 Section 501(c-1) provides:

*740 **135 "(c-1) As used in this subsection (c-1), 'interim attorney's fees and costs' means attorney's fees and costs assessed from time to time while a case is pending, in favor of the petitioning party's current counsel, for reasonable fees and costs either already incurred or to be incurred, and 'interim award' means an award of interim attorney's fees and costs. Interim awards shall be governed by the following:

(1) Except for good cause shown, a proceeding for (or relating to) interim attorney's fees and costs in a pre-judgment dissolution proceeding shall be nonevidentiary and summary in nature. All hearings for or relating to interim attorney's fees and costs under this subsection shall be scheduled expeditiously by the court." (Emphasis added.) 750 ILCS 5/501(c-1) (West 2014).

Then, in subsections (c-1)(1)(A)-(I), it sets forth nine factors for the court to consider when making an award. 750 ILCS 5/501(c-1)(1)(A)-(I) (West 2014).

¶ 30 Carol argues that the trial court abused its discretion by failing to expeditiously schedule hearings on her first and second motions for interim attorney fees. Carol filed her first motion for interim attorney fees on November 2, 2015.

Carol's notice of motion indicated that the motion would be presented to the trial court on December 3, 2015, at a status call. However, Carol's first motion for interim attorney fees was not heard that day; instead, the trial court stated that it would "set [the case] for trial on all open pleadings" the following Tuesday. Carol asserts that the following Tuesday the trial court did not set a hearing date for her first motion for interim attorney fees. Regarding Carol's second motion, filed on February 29, 2016, she argues that the trial court stated on March 3, 2016, that it had not yet scheduled a hearing on her motion.

- [5] ¶31 While it is true that a party who requests a hearing on attorney fees must be given one, the failure to request such a hearing results in a forfeiture of one's right to the hearing. See *Cabrera v. First National Bank of Wheaton*, 324 III.App.3d 85, 103, 257 III.Dec. 512, 753 N.E.2d 1138 (2001) (failure to request a hearing on a motion results in forfeiture).
- ¶ 32 In this case, Carol does not indicate where in the record she ever asked the trial court for a hearing date on either her first or second motion for interim attorney fees, or where in the record the trial court denied Carol's request for a hearing. In fact, during the hearing on Larry's motion to dismiss Carol's third motion for interim attorney fees, the trial court stated:

"There has been an argument made that a prior interim fee petition had been filed by Carol and somehow the Court has denied Carol access to the Court system to have those matters resolved in a timely way.

The Court has no recollection of such denial."

- ¶ 33 Carol cites nothing in the record that contradicts the trial court's finding. Accordingly, we conclude that Carol forfeited her right to a hearing on her first and second motions for interim attorney fees. See *id*.
- ¶ 34 Next, Carol argues that the trial court erred by granting Larry's section 2-615 motion to dismiss her third motion for interim attorney fees.
- [6] [7] [8] [9] ¶ 35 A motion to dismiss under section 2-615 of the Code challenges only the legal sufficiency of the complaint. *Bonhomme v. St. James*, 2012 IL 112393, ¶ 34, 361 III.Dec. 1, 970 N.E.2d 1. The critical inquiry is whether the allegations of the complaint, when considered in the light *741 **136 most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted. *Id.* All well-pled facts in the complaint must be taken as

true, but conclusions of law will not be taken as true unless supported by specific factual allegations. *Id.* The dismissal of a complaint under section 2-615 of the Code is reviewed *de novo*. *Khan v. Deutsche Bank AG*, 2012 IL 112219, ¶ 47, 365 Ill.Dec. 517, 978 N.E.2d 1020.

- ¶ 36 Carol argues that the trial court applied the wrong rule of law in granting Larry's section 2-615 motion to dismiss her third motion for interim attorney fees. Carol argues that the trial court (1) erroneously characterized her motion as for a final fee contribution pursuant to section 503(j) of the Marriage Act (750 ILCS 5/503(j) (West 2014)) and (2) erroneously determined that, without a written agreement between Carol and Kinnan, section 508(c) of the Marriage Act (750 ILCS 5/508(c) (West Supp. 2015)) precluded attorney fees and costs.
- [10] ¶37 Because it is dispositive, we discuss Carol's second argument first. Section 508(c) provides, in part:
 - "(c) Final hearings for attorney's fees and costs against an attorney's own client, pursuant to a Petition for Setting Final Fees and Costs of either a counsel or a client, shall be governed by the following:

* * *

(2) No final hearing under this subsection (c) is permitted unless: (i) the counsel and the client had entered into a written engagement agreement at the time the client retained the counsel (or reasonably soon thereafter) and the agreement meets the requirements of subsection (f); (ii) the written engagement agreement is attached to an affidavit of counsel that is filed with the petition or with the counsel's response to a client's petition; (iii) judgment in any contribution hearing on behalf of the client has been entered or the right to a contribution hearing under subsection (j) of Section 503 has been waived; (iv) the counsel has withdrawn as counsel of record; and (v) the petition seeks adjudication of all unresolved claims for fees and costs between the counsel and the client. Irrespective of a Petition for Setting Final Fees and Costs being heard in conjunction with an original proceeding under this Act, the relief requested under a Petition for Setting Final Fees and Costs constitutes a distinct cause of action. A pending but undetermined Petition for Setting Final Fees and Costs shall not affect appealability or enforceability of any judgment or other adjudication in the original proceeding." (Emphases added.) Id.

¶ 38 The plain language of section 508(c) clearly indicates that the legislature intended the requirement of a "written engagement agreement" to apply to "an attorney seeking fees from his or her former client." *In re Parentage of Rocca*, 408 III.App.3d 956, 967, 349 III.Dec. 507, 946 N.E.2d 1003 (2011). As the issue here involves Carol seeking fees from the opposing party, section 508(c) is inapplicable here. See *id*.

[11] ¶ 39 Larry argues that section 508 directs courts to apply certain section 503 factors. Larry notes that section 508(a) provides that "[a]ll provisions for contribution under this subsection shall also be subject to [paragraph (5) of subsection (j) of Section 503]." 750 ILCS 5/508(a) (West 2014). Larry also notes that section 503(j)(5) provides:

"A contribution award (payable to either the petitioning party or the party's *742 **137 counsel, or jointly, as the court determines) may be in the form of either a set dollar amount or a percentage of fees and costs (or a portion of fees and costs) to be subsequently agreed upon by the petitioning party and counsel or, alternatively, thereafter determined in a hearing pursuant to subsection (c) of Section 508 or previously or thereafter determined in an independent proceeding under subsection (e) of Section 508." (Emphases added.) 750 ILCS 5/503(j)(5) (West 2014).

Larry contends that, therefore, if a set dollar amount cannot be agreed upon by the petitioning party and counsel, then that amount must be determined in a hearing pursuant to either subsection (c) or (e) of section 508.

- ¶ 40 Larry concludes that, because the amount of fees Carol owes to Kinnan is uncertain, a determination must be made pursuant to section 508(c) before any amount of contribution from Larry can be assessed; otherwise section 503(j)(5) has no meaning. We disagree with Larry.
- ¶ 41 The plain language of section 503(j)(5) clearly indicates that the legislature intended that, where counsel has received no payment from his client due to hardship, a court could order a contribution award "to the party's counsel." Section 508(c) applies only if counsel and his client, the "petitioning party," cannot agree on how much each should receive from the contribution award. In this case, Carol has no claim to any contribution amount, because the record indicates that she has paid nothing to Kinnan. Attorney fees, while awarded to the client, actually belong to the attorney. See *Rocca*, 408 Ill.App.3d at 969, 349 Ill.Dec. 507, 946 N.E.2d 1003.

¶ 42 Our interpretation is in concert with the purposes underlying the Parentage Act. In *Stella*, the appellate court, addressing two certified questions, held that interim attorney fees can be awarded in a parentage proceeding under the costs provision of the Parentage Act of 1984 (750 ILCS 45/17 (West 2002)) and sections 501(c-1) and 508 of the Marriage Act (750 ILCS 5/501(c1), 508 (West 2002)). *Stella*, 353 Ill.App.3d at 420-21, 288 Ill.Dec. 889, 818 N.E.2d 824. The appellate court reasoned that a "fundamental reason" for the interim fee system in the Marriage Act was to "prevent a party from using his or her relative wealth as a litigation tool." (Internal quotation marks omitted.) *Id.* at 420, 288 Ill.Dec. 889, 818 N.E.2d 824. Further, the court explained:

"Providing interim attorney fees in Parentage Act and Marriage Act cases well might produce similar public policy benefits that would not have escaped the legislature's attention: avoiding long delays, discouraging the use of superior assets as a litigation tool, encouraging attorneys to undertake parentage actions, and reducing the risk of simply outlasting the disadvantaged party." *Id.* at 420-21, 288 Ill.Dec. 889, 818 N.E.2d 824.

- ¶ 43 Similarly, in *Rocca*, this court held that the mother's attorney had a right to seek contribution from the father for attorney fees under the Parentage Act of 1984. Our court stated:
 - "'The fee-shifting provisions of section 508, coupled with the court's ability to award fees directly to the attorney, provide an incentive for attorneys who might otherwise decline to represent spouses with few financial resources of their own. Thus, the attorney's right to proceed against the other spouse for an award of fees is oftentimes essential to a spouse's ability to procure legal representation.' "Rocca, 408 Ill.App.3d at 962, 349 Ill.Dec. 507, 946 N.E.2d 1003 (quoting *743 **138 Lee v. Lee, 302 Ill.App.3d 607, 612-13, 236 Ill.Dec. 222, 707 N.E.2d 67 (1998)).
- ¶44 Thus, the trial court erroneously determined that, without a written agreement between Carol and Kinnan, section 508(c) of the Marriage Act precluded contribution to attorney fees and costs. Accordingly, the trial court erred by dismissing Carol's motion for attorney fees. The trial court should have held an evidentiary hearing, despite the lack of a written agreement between Kinnan and his client pursuant to section 508(c). The cause is remanded to the trial court for a hearing on Carol's motion seeking contribution to attorney fees and costs pursuant to sections 508(a) and 503(j) of the Marriage Act. See 750 ILCS 5/508(a) (West 2014) ("[C]ontribution to

attorney's fees and costs may be awarded from the opposing party in accordance with subsection (j) of Section 503 * * *."); 750 ILCS 5/503(j) (West 2014).

¶ 47 Reversed and remanded.

¶ 45 III. CONCLUSION

¶ 46 For the reasons stated, we reverse the trial court's order and remand for further proceedings.

Justices Zenoff and Burke concurred in the judgment and opinion.

All Citations

2017 IL App (2d) 160554, 77 N.E.3d 734, 413 Ill.Dec. 129

End of Document

EXHIBIT 114

KeyCite Yellow Flag - Negative Treatment

Declined to Follow by Korean Presbyterian Church of Seattle Normalization Committee v. Lee, Wash.App. Div. 1, September 26,

> 723 S.W.2d 544 Missouri Court of Appeals, Western District.

Harold and Hazel HESTER, Appellants,

Donald R. BARNETT, Respondent.

No. WD 36517. Jan. 20, 1987.

Synopsis

Husband and wife brought action against clergyman alleging defamation, ministerial malpractice, alienation of affections, intentional infliction of emotional distress, invasion of privacy, and interference with contract. Minister moved to dismiss. The Circuit Court, Nodaway County, Montgomery L. Wilson, J., sustained minister's motion to dismiss as to each of several counts. Plaintiffs appealed. The Court of Appeals, Shangler, J., held that: (1) even assuming viability of clergyman malpractice remedy for negligent counseling, allegation that minister "acted contrary to ministerial ethics and against Missouri law * * * and against the standard of conduct imposed upon ministers of the gospel" did not allege such cause of action; (2) plaintiffs pleaded cause of action for spousal alienation of affections; (3) claim of parent against third person for alienation of affections of child is not actionable; (4) complaint pleaded justiciable claim for defamation; (5) complaint sufficiently pleaded tort of unreasonable intrusion upon seclusion of another; (6) complaint pleaded cause of action for tortious interference with contract; and (7) allegations described secular conduct and hence stated cause of action outside scope of free exercise clause.

Affirmed in part and reversed in part; reinstatement of counts II and V ordered.

Procedural Posture(s): On Appeal; Motion to Dismiss.

West Headnotes (57)

Pretrial Procedure \hookrightarrow Well-pleaded facts [1]

307A Pretrial Procedure

307AIII Dismissal

307AIII(B) Involuntary Dismissal

307AIII(B)6 Proceedings and Effect

307Ak686 Matters Deemed Admitted

307Ak687 Well-pleaded facts

Motion to dismiss concedes truth of all facts well pleaded, so that in assessment of sufficiency of petition under such motion, all facts properly pleaded are assumed as true, averments are given liberal construction, and petition is given favor of those inferences fairly deducible from the facts alleged. V.A.M.R. 55.05.

2 Cases that cite this headnote

[2] **Pretrial Procedure** \hookrightarrow Insufficiency in general

307A Pretrial Procedure

307AIII Dismissal

307AIII(B) Involuntary Dismissal

307AIII(B)4 Pleading, Defects In, in General

307Ak622 Insufficiency in general

Petition suffices against motion to dismiss if averments, given every reasonable intendment, invoke substantive remedy. V.A.M.R. 55.05.

[3] Religious Societies 🐎 Torts

332 Religious Societies

332k30 Torts

Cleric is amenable to suit for alienation of affection albeit guised as religious practice, assault and battery committed during religious service, malicious prosecution of parents informed against by cleric for child abuse, obstention of donations of money by fraud, and for other incidences of intentional tort in exercise of religious duty.

[4] Religious Societies 🐎 Torts

332 Religious Societies

332k30 Torts

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CONFIDENTIAL TR-0562422 Intentional torts of cleric are actionable, even though incidents of religious practice and belief.

1 Cases that cite this headnote

[5] Constitutional Law - Clergy; Ministers

92 Constitutional Law

92XIII Freedom of Religion and Conscience

92XIII(B) Particular Issues and Applications

92k1327 Religious Organizations in General

92k1340 Clergy; Ministers

92k1340(1) In general

(Formerly 92k84.5(10))

Liability for cleric's intentional torts does not clash with free exercise clause of First Amendment because conduct, albeit promoted by religious belief, is subject to regulation for protection of society. U.S.C.A. Const.Amend. 1.

17 Cases that cite this headnote

[6] Religious Societies 🐎 Torts

332 Religious Societies

332k30 Torts

While statute which renders clergyman incompetent to testify concerning communication made to him in professional character as spiritual advisor no doubt means to encourage effective relationship between spiritual advisor and communicant, enactment has no effect beyond its actual terms and does not impose "minimum standard for the profession." V.A.M.S. § 491.060(4).

1 Cases that cite this headnote

[7] Religious Societies 🐎 Torts

332 Religious Societies

332k30 Torts

Tradition that spiritual advisor not divulge communications received in that capacity, even if tenet of "ministerial ethics," describes moral, not legal duty.

2 Cases that cite this headnote

[8] Torts - Duty and breach thereof in general

379 Torts

379I In General

379k109 Duty and breach thereof in general (Formerly 379k3)

Breach of moral duty is not sufficient to invest tort liability.

1 Cases that cite this headnote

[9] Religious Societies 🐎 Torts

332 Religious Societies

332k30 Torts

Even assuming viability of clergyman malpractice remedy for negligent counseling, allegation that minister "acted contrary to ministerial ethics and against Missouri law * * and against the standard of conduct imposed upon ministers of the gospel" did not allege such cause of action.

2 Cases that cite this headnote

[10] Marriage and Cohabitation 🐎 Right of

action; effect of statute

253 Marriage and Cohabitation

253VI Torts

253VI(B) Alienation of Affections

253k1102 Right of action; effect of statute

(Formerly 205k323.1, 205k323 Husband and Wife)

Tort of alienation of affections of a spouse, albeit discarded as a remedy in many states, remains intact in Missouri.

1 Cases that cite this headnote

[11] Marriage and Cohabitation 🐤 Pleading

253 Marriage and Cohabitation

253VI Torts

253VI(B) Alienation of Affections

253k1107 Pleading

(Formerly 205k332 Husband and Wife)

Complaint sufficiently pleaded cause of action against minister for spousal alienation of affections; pleading alleged that minister had implied that wife's separation from her husband would gain wife friendship of members of community over whom minister claimed to exercise influence and control, and that as direct and proximate result of such tortious conduct,

wife lost love, care, companionship, consortium and trust of her husband.

[12] Constitutional Law Particular Issues and Applications

92 Constitutional Law

92XIII Freedom of Religion and Conscience

92XIII(B) Particular Issues and Applications

92k1310 In general

(Formerly 92k84.5(1))

Conduct or actions which pose some substantial threat to public safety, peace or order may be subject to governmental regulation, even though prompted by religious beliefs or principles. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[13] Constitutional Law 🐎 Family Law

Marriage and Cohabitation ← Right of

action; effect of statute

92 Constitutional Law

92XIII Freedom of Religion and Conscience

92XIII(B) Particular Issues and Applications

92k1404 Family Law

92k1405 In general

(Formerly 92k84.5(1))

253 Marriage and Cohabitation

253VI Torts

253VI(B) Alienation of Affections

253k1102 Right of action; effect of statute

(Formerly 205k323.1, 205k323 Husband and Wife)

Intentional interference with spousal relationship by third person is threat to public welfare and order that law may redress, right of free exercise of religion notwithstanding, and alienation of affections of one spouse from the other disrupts not only personal felicity but also undermines family relationship; where however, interference involves merely preachment of doctrine or advocacy of religious faith without unlawful or improper motive, no paramount state consideration is affected, and alienation is not actionable, U.S.C.A. Const.Amend, 1.

1 Cases that cite this headnote

[14] Parent and Child Interference with parent-child relationship

285 Parent and Child

285VI Rights, Duties, and Liabilities Concerning Relation

285VI(C) Parent's Claims for Injuries to Child

285k322 Existence, Nature, and Grounds of

Action

285k326 Interference with parent-child relationship

(Formerly 285k7(1))

Claim of parent against third person for alienation of affections of child is not actionable.

3 Cases that cite this headnote

[15] Libel and Slander - Setting out defamatory matter

237 Libel and Slander

237IV Actions

237IV(B) Parties, Preliminary Proceedings, and Pleading

237k79 Declaration, Complaint, or Petition

237k85 Setting out defamatory matter

Allegations that minister published and republished among church members and community at large, false statements imputing to character defamation plaintiffs crimes of theft, arson and child abuse, dishonesty in business and cruelty to children, stated cause of action for defamation. U.S.C.A. Const.Amend. 1.

[16] Libel and Slander Presumption as to damage; special damages

237 Libel and Slander

237I Words and Acts Actionable, and Liability Therefor

237k31 Injury from Defamation

237k33 Presumption as to damage; special damages

False utterances which hold one up to hatred, contempt or ridicule, or cause person to be shunned and avoided, or which induce evil opinion of one in minds of right-thinking persons are defamations actionable per se.

1 Cases that cite this headnote

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[17] **Libel and Slander** \leftarrow Presumption as to damage; special damages

237 Libel and Slander

237I Words and Acts Actionable, and Liability Therefor

237k31 Injury from Defamation

237k33 Presumption as to damage; special

False imputation of crime is defamatory per se, as is false imputation that person is dishonest in business relation, or, by very definition, imputation that parents cruelly abuse their children.

2 Cases that cite this headnote

Libel and Slander \leftarrow Setting out defamatory matter

237 Libel and Slander

237IV Actions

[18]

237IV(B) Parties, Preliminary Proceedings, and

237k79 Declaration, Complaint, or Petition

237k85 Setting out defamatory matter

To be sufficient as pleading for libel per se, petition must set forth defamation published in haec verba, or, at very least, paraphrase of what is charged as the libel.

1 Cases that cite this headnote

[19] **Libel and Slander** \leftarrow Nature and grounds of privilege in general

237 Libel and Slander

237II Privileged Communications, and Malice Therein

237k34 Nature and grounds of privilege in

It is not time or place of alleged defamation, but occasion which determines whether publication of slander is privileged and whether slander is, under circumstances, absolutely or conditionally or qualifiedly privileged.

[20] **Libel and Slander** Form and requisites in general

237 Libel and Slander

237IV Actions

237IV(B) Parties, Preliminary Proceedings, and Pleading

237k79 Declaration, Complaint, or Petition

237k80 Form and requisites in general

Count, in which it was alleged that minister published and republished false statements among church members in sermons from pulpit of church, letters and other written publications, and reports to child abuse hot line, and at convocations of neighbors, sufficiently defined occasions for publications of false statements, for purpose of alleging cause of action for defamation of character. U.S.C.A. Const. Amend.

Libel and Slander 🐎 Absolute Privilege [21] Libel and Slander 🔑 Qualified Privilege

237 Libel and Slander

237II Privileged Communications, and Malice Therein

237k35 Absolute Privilege

237k36 In general

237 Libel and Slander

237II Privileged Communications, and Malice Therein

237k40 Qualified Privilege

237k41 In general

Privilege, absolute or qualified, is complete defense against liability for libel.

1 Cases that cite this headnote

Libel and Slander - Good faith in exercise [22] of privilege or right

237 Libel and Slander

237II Privileged Communications, and Malice

237k50 Good faith in exercise of privilege or right

Qualified privilege is conditioned upon good motive and reasonable behavior and is forfeited if abused.

Libel and Slander \hookrightarrow Existence and Effect of [23] Malice

237 Libel and Slander

237II Privileged Communications, and Malice Therein

237k51 Existence and Effect of Malice

237k51(1) In general

Publications uttered with malice forfeit the immunity of privilege; malice, however, does not destroy an absolute privilege.

[24] Libel and Slander 🐎 Absolute Privilege

237 Libel and Slander

237II Privileged Communications, and Malice Therein

237k35 Absolute Privilege

237k36 In general

Absolute immunity as to defamatory publications is confined to the few situations where there is an obvious policy in favor of permitting complete freedom of expression, without any inquiry as to defendant's motives; occasions for absolute privilege are limited and extend to judicial, legislative or executive proceedings, among others, and to occasions where communication is provided for and required by law.

4 Cases that cite this headnote

[25] Libel and Slander - Absolute Privilege

237 Libel and Slander

237II Privileged Communications, and Malice Therein

237k35 Absolute Privilege

237k36 In general

Immunity from liability that statute grants to reports of child abuse or neglect are not absolute, but qualified and conditional. V.A.M.S. § 210.135.

1 Cases that cite this headnote

[26] Libel and Slander ← Exceeding privilege or right

237 Libel and Slander

237II Privileged Communications, and Malice

237k50.5 Exceeding privilege or right (Formerly 237k501/2)

Allegations that minister knew his statements and publication that defamation character plaintiffs practiced child abuse were false when made were not subject to immunity under statute granting privilege to reports of child abuse or neglect. V.A.M.S. § 210.135.

2 Cases that cite this headnote

[27] Constitutional Law Freedom of Religion and Conscience

92 Constitutional Law

92XIII Freedom of Religion and Conscience

92XIII(A) In General

92k1290 In general

(Formerly 92k84.1, 92k84(1))

Only religious freedom to believe is absolute; freedom to act remains subject to regulation for protection of society. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[28] Constitutional Law & Beliefs protected; inquiry into beliefs

92 Constitutional Law

92XIII Freedom of Religion and Conscience

92XIII(A) In General

92k1292 Beliefs protected; inquiry into beliefs
(Formerly 92k84.2, 92k84(2))

(Formerly 92k84.2, 92k84(2))

Where truth or falsity of religious belief becomes object of judicial redress, inquiry enters forbidden domain. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[29] Constitutional Law Particular Issues and Applications

92 Constitutional Law

92XIII Freedom of Religion and Conscience

92XIII(B) Particular Issues and Applications

92k1310 In general

(Formerly 92k84.5(1))

Court may justly allow vindication of right to reputation without constitutional infringement, albeit words and conduct of defamation were uttered in religious setting. U.S.C.A. Const.Amend. 1.

[30] Constitutional Law Free Exercise of Religion

92 Constitutional Law

92XIII Freedom of Religion and Conscience

92XIII(A) In General

92k1302 Free Exercise of Religion

92k1303 In general

(Formerly 92k84.1, 92k84(1))

It is only religious belief and practice that free exercise clause protects absolutely against governmental regulation, and not secular belief and practice, U.S.C.A. Const.Amend. 1.

[31] Constitutional Law Particular Issues and Applications

92 Constitutional Law

92XIII Freedom of Religion and Conscience

92XIII(B) Particular Issues and Applications

92k1310 In general

(Formerly 92k84.5(1))

Claim and proof of defamation may not involve truth or falsity of statements of religious belief or tenet made by minister; however, they could show that, although delivered in milieu of religious practice, beliefs asserted as religious were not held as such in good faith, but were used to cloak secular purpose that is, to injure reputation. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[32] Constitutional Law 🐎 Clergy; Ministers

92 Constitutional Law

92XIII Freedom of Religion and Conscience

92XIII(B) Particular Issues and Applications

92k1327 Religious Organizations in General

92k1340 Clergy; Ministers

92k1340(1) In general

(Formerly 92k84.5(10))

Minister's alleged statements imputing to defamation of character plaintiffs crimes of theft, arson, child abuse, dishonesty in business and cruelty to children, were not of kind inherently and invariably expressions of religious belief or religious purpose so as to come under absolute protection of free exercise clause against governmental regulation; thus, it was competent for court to inquire whether sermon

declarations were expressions of actual creed and practice, held in exercise of good faith, or were merely religious occasions for wholly secular purpose of intentional defamation and injury to reputation of persons not even communicants of church. U.S.C.A. Const.Amend. 1.

5 Cases that cite this headnote

[33] Constitutional Law Particular Issues and Applications

92 Constitutional Law

92XIII Freedom of Religion and Conscience

92XIII(B) Particular Issues and Applications

92k1310 In general

(Formerly 92k84.5(1))

Free exercise clause forbids court from any evaluation of "correctness" of content of religious sermons as expressions of belief or religious practice. U.S.C.A. Const.Amend. 1.

[34] Constitutional Law 🕪 Discipline; expulsion

92 Constitutional Law

92XIII Freedom of Religion and Conscience

92XIII(B) Particular Issues and Applications

92k1327 Religious Organizations in General

92k1336 Membership

92k1336(2) Discipline; expulsion

(Formerly 92k84.5(7.1), 92k84.5(7))

If defamation of character plaintiffs were members of minister's church and congregation, they presumptively consented to religiously motivated discipline practiced in good faith.

2 Cases that cite this headnote

[35] Religious Societies - Membership in general

332 Religious Societies

332k7 Membership in general

Consent to submit to discipline of church, sect, or congregation is one of contract between member and religious body.

1 Cases that cite this headnote

[36] Religious Societies 🐎 Membership in general

332 Religious Societies

332k7 Membership in general

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Discipline religious body may impose upon those who consent to submit to its discipline must be within terms of that consent.

[37] Libel and Slander - Common membership in church

237 Libel and Slander

237II Privileged Communications, and Malice Therein

237k40 Qualified Privilege

237k45 Common Interest in Subject-Matter

237k45(3) Common membership in church

Minister's statements, from pulpit and other locations, if made to members of minister's church or congregation, were privileged communications enjoined by duty upon minister to church members with corresponding interest or duty. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[38] Libel and Slander ← Existence and Effect of Malice

237 Libel and Slander

237II Privileged Communications, and Malice

237k51 Existence and Effect of Malice

237k51(1) In general

Privilege granted to expressions of religious practice is qualified and is lost if it is proven that declarant acted with intention to injure reputation, feelings or profession; use of pulpit as pretext for practice of religion, but as occasion for intentional defamation is neither justified by privilege nor protected by free exercise clause. U.S.C.A. Const.Amend. 1.

[39] Libel and Slander 🤛 Privilege

237 Libel and Slander

237IV Actions

237IV(C) Evidence

237k101 Presumptions and Burden of Proof

237k101(4) Privilege

Burden to prove defense of privilege in defamation action rests on person who asserts privilege.

[40] Libel and Slander ← Setting out defamatory matter

237 Libel and Slander

237IV Actions

237IV(B) Parties, Preliminary Proceedings, and Pleading

237k79 Declaration, Complaint, or Petition

237k85 Setting out defamatory matter

Allegations attributing false statements delivered by minister, published and republished among church members and community at large, which imputed to defamation of character plaintiffs the crimes of theft, arson and child abuse, dishonesty in business and cruelty to children pleaded justiciable claim for defamation.

1 Cases that cite this headnote

[41] Damages 🕪 Nature of conduct

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)2 Mental Suffering and Emotional Distress

115k57.19 Intentional or Reckless Infliction of

Emotional Distress; Outrage

115k57.22 Nature of conduct

(Formerly 115k50.10)

Gist of "tort of extreme and outrageous conduct" is intentional infliction of emotional distress on another by conduct so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in civilized community; it is conduct so extreme as to exceed any reasonable limit of social toleration.

5 Cases that cite this headnote

[42] Pleading Adoption of allegations in other pleadings

302 Pleading

302I Form and Allegations in General

302k15 Adoption of allegations in other pleadings Adoption by reference technique is designed to avoid repetition and redundancy characteristic

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of common-law system of pleading. V.A.M.R. 55.12.

[43] Pleading Adoption of allegations in other pleadings

302 Pleading

302I Form and Allegations in General

302k15 Adoption of allegations in other pleadings Adoption by reference procedure for pleading does not dispel requirement that pleadings, as enhanced by reference adopted, be simple, concise, and direct. V.A.M.R. 55.04, 55.05, 55.12; Fed.Rules Civ.Proc.Rule 10(c), 28 U.S.C.A.

2 Cases that cite this headnote

[44] Pleading Adoption of allegations in other pleadings

302 Pleading

302I Form and Allegations in General

302k15 Adoption of allegations in other pleadings Reference not sufficiently clear and explicit to advise adversary of the issue tendered for trial is not effective as incorporation of pleading. V.A.M.R. 55.04, 55.05, 55.12; Fed.Rules Civ.Proc.Rule 10(c), 28 U.S.C.A.

[45] Pleading Pleading Reference from one count or paragraph to another

302 Pleading

302II Declaration, Complaint, Petition, or Statement

302k54 Reference from one count or paragraph to another

Attributions of infamous conduct alleged in first count as defamations would not be incorporated into second count alleging extreme and outrageous conduct, as to do so would be to allow not alternative remedy, but redundant and duplicate remedy. V.A.M.R. 55.06(a).

1 Cases that cite this headnote

[46] Pleading • Adoption of allegations in other pleadings

302 Pleading

3021 Form and Allegations in General 302k15 Adoption of allegations in other pleadings Attempted incorporation by reference by allusion, in count alleging extreme and outrageous conduct, to "those actions described specifically in other Counts" did not inform defendant as to nature and extent of incorporation, and it was thus ineffective as adoption by reference. V.A.M.R. 55.12.

1 Cases that cite this headnote

[47] Torts 🐎 Intrusion

379 Torts

379IV Privacy and Publicity

379IV(B) Privacy

379IV(B)2 Intrusion

379k340 In general

(Formerly 379k8.5(4), 379k5(4))

Unreasonable intrusion upon seclusion of another tort encompasses three elements: existence of secret and private subject matter, right in plaintiffs to keep that subject matter private, and obtainment by defendant of information about that subject matter through unreasonable means.

8 Cases that cite this headnote

[48] Torts 🐎 Intrusion

379 Torts

379IV Privacy and Publicity

379IV(B) Privacy

379IV(B)2 Intrusion

379k340 In general

(Formerly 379k8.5(4))

Publicity is not element of tort of unreasonable intrusion upon seclusion of another.

3 Cases that cite this headnote

[49] Torts - Particular cases in general

379 Torts

379IV Privacy and Publicity

379IV(B) Privacy

379IV(B)1 Privacy in General

379k332 Particular cases in general

(Formerly 379k26(1))

Allegation that minister had intruded upon solitude and seclusion by entering home

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under disguise of helping family through family counseling and assistance with children's behavior problems, when minister's true motive was to harm, sufficiently pleaded tort of unreasonable intrusion upon seclusion of another.

3 Cases that cite this headnote

[50] Torts 🄛 Pleading

379 Torts 379IV Privacy and Publicity 379IV(D) Actions in General 379k415 Pleading (Formerly 379k26(1))

Allegation that minister made public untrue accusations of child abuse with intent and for purpose of disturbing privacy did not suffice either as statement of claim for unreasonable publication of private facts tort, or for false light of invasion of privacy tort.

3 Cases that cite this headnote

Torts - Privacy in General [51]

379 Torts 379IV Privacy and Publicity 379IV(B) Privacy 379IV(B)1 Privacy in General 379k330 In general (Formerly 379k8.5(2))

Tort of invasion of privacy is not species of defamation; where claim for recovery on either theory, publication of private facts or false light invasion of privacy, involves untrue statements, appropriate remedy is by defamation.

6 Cases that cite this headnote

[52] Constitutional Law Clergy; Ministers

92 Constitutional Law 92XIII Freedom of Religion and Conscience 92XIII(B) Particular Issues and Applications 92k1327 Religious Organizations in General 92k1340 Clergy; Ministers 92k1340(1) In general (Formerly 92k84.5(10)) Count pleading injury from course of

intentionally tortious action by minister, on

occasion only pretextually religious, but actually entirely secular, was not offensive to free exercise clause. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[53] **Labor and Employment** \leftarrow Pleading

231H Labor and Employment 231HIX Interference with the Employment Relationship 231Hk915 Actions in General 231Hk917 Pleading (Formerly 379k26(1))

Count pleading that minister enticed, harassed, intimidated, and threatened, and caused employees to leave employment, thereby rendering plaintiffs unable to employ and maintain labor to conduct their business, and that minister's actions were intentional and malicious. sufficiently pleaded cause of action for tortious interference with contract.

1 Cases that cite this headnote

[54] Torts - Contracts

379 Torts 379III Tortious Interference 379III(B) Business or Contractual Relations 379III(B)1 In General 379k212 Contracts (Formerly 379k26(1))

In order to plead tortious interference with contract, it is enough that petition plead business relationship, present or future, with which defendant has knowingly interfered, without justification, to damage of pleaders.

2 Cases that cite this headnote

Torts \leftarrow Knowledge and intent; malice [55]

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Torts \hookrightarrow Absence of justification or privilege
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379 Torts 379III Tortious Interference 379III(B) Business or Contractual Relations 379III(B)1 In General 379k215 Knowledge and intent; malice (Formerly 379k12) 379 Torts 379III Tortious Interference

379III(B) Business or Contractual Relations 379III(B)1 In General 379k217 Absence of justification or privilege (Formerly 379k12)

Proof of tortious interference with contract must show intent and primary purpose in actor to interfere and to cause result interference augurs; proof must also show that interference was without justification, that is to say, unprivileged as well as unlawful.

2 Cases that cite this headnote

[56] Labor and Employment ← Contracts or relationships susceptible or subject to interference

231H Labor and Employment 231HIX Interference with the Employment Relationship

231Hk903 Contracts or relationships susceptible or subject to interference

(Formerly 255k341 Master and Servant)
That employment is at will does not justify a third person, without privilege, to induce breach of contract with purpose of doing injury to party to contract.

[57] Constitutional Law - Clergy; Ministers

Torts ← Defenses and Mitigating

Circumstances

92 Constitutional Law

92XIII Freedom of Religion and Conscience

92XIII(B) Particular Issues and Applications

92k1327 Religious Organizations in General

92k1340 Clergy; Ministers

92k1340(1) In general

(Formerly 92k84.5(10))

379 Torts

379I In General

379k120 Defenses and Mitigating Circumstances

379k121 In general

(Formerly 379k16)

Allegations of minister's unlawful enticements, intimidations and threats to plaintiffs' employees described secular conduct, pretext of religious purpose notwithstanding, and hence stated cause of action outside scope of free exercise clause. U.S.C.A. Const.Amend. 1.

7 Cases that cite this headnote

Attorneys and Law Firms

*549 David T. Greis, Kansas City, for appellants.

Larry Zahnd, Zahnd, Dietrich & Ross, Maryville, for respondent.

Before PRITCHARD, P.J., SHANGLER, J., and MARTIN, Special Judge.

Opinion

SHANGLER, Judge.

The action for damages by the plaintiffs Hester, husband and wife, against defendant Barnett, a Baptist clergyman, commenced as a petition in defamation. The motion of the defendant to dismiss that petition was sustained, and the plaintiffs were granted leave to present a more definite and certain statement of the defamation. The petition as amended pleads not only defamation, but also five other separate causes of action denominated: [Count I] Ministerial Malpractice, [Count II] Alienation of Affections, [Count III] Defamation of Character, [Count IV] Intentional Infliction of Emotional Distress, [Count V] Invasion of Privacy, and [Count VI] Interference with Contract. The defendant Barnett moved to dismiss the petition as amended, and the court sustained the motion as to each of the several counts "for failure to state causes of action upon which relief may be granted." The plaintiffs appeal the judgment of dismissal.

[1] [2] A motion to dismiss concedes the truth of all facts well pleaded. In the assessment of the sufficiency of a petition under such a motion, therefore, all facts properly pleaded are assumed as true, the averments are given a liberal construction, and the petition is given the favor of those inferences fairly deducible from the facts alleged. *Commercial Bank of St. Louis Co. v. James*, 658 S.W.2d 17, 23[3–10] (Mo. banc 1983). A petition suffices against a motion to dismiss, accordingly, if the averments, given every reasonable intendment, invoke a substantive remedy. *Hyde v. City of Columbia*, 637 S.W.2d 251, 254[1–3] (Mo.App.1982); Rule 55.05. It is within the perspective of these maxims that we review the judgment of dismissal.

***550** The first amended petition alleges these operative facts:

The plaintiffs Hester, husband and wife, reside in Nodaway County. The wife is the mother of Connie Wymer, Lee Wymer and Don Wymer, and the husband is their stepfather. The defendant Barnett is an ordained minister of the Baptist Church. The principals met when the minister visited the Hester home and presented himself to the family as an ordained Baptist clergyman. He invited them to trust and confide in him and assured them that any communication with him as minister would be kept in strictest confidence and not be divulged to anyone outside the Hester family. The husband and wife then confided in the minister that the three children, Connie, Lee and Don were beset with disciplinary and behavioral problems. The minister offered his family counseling services as the solution. Notwithstanding the prior assurances, the minister divulged to deacons of the church and members of the community the confidential communications from the family, and without their authority. The minister lied to these others about the communications and, in particular, that the Hesters abused the children and used them cruelly. The minister advised and instructed the children to lie to others as to the mode of the discipline so that they would eventually be removed from the home of the mother and stepfather. The minister undertook a course of action, which continues, designed to defame the Hesters in their community by denunciations that they are both irreligious and abusive parents. The minister thereafter apologized to the Hesters for this conduct and prayed for forgiveness in their presence, but nevertheless continues that course of conduct and refuses to retract the statements made to members of the public.

The petition alleges also that the minister intentionally and maliciously "set out to alienate the affections of one from the others," did alienate the children, Connie, Lee and Don, from the mother and stepfather, and attempted to induce the alienation of the wife from the husband.

The petition alleges also, by a catalogue of particulars, that the minister has, since January of 1984, used every opportunity to defame them, and from the pulpit as well as in letters and memoranda, church bulletins and publications, accused them of crimes, of physical and emotional abuse of the children and other relations, has falsely accused them of such conduct over the Hot Line for Child Abuse, and has organized and directed meeting of neighbors to publish the libels and slanders against the Hesters. The petition alleges also that the minister has harassed, intimidated, threatened and caused the

Hester employees to leave employment and so interfered with the Hester farming business.

The petition pleads these allegations as a continuous narrative, punctuated into the six designations of causes of action already described: Ministerial Malpractice, Alienation of Affections, Defamation of Character, Intentional Infliction of Emotional Distress, Invasion of Privacy, and Interference with Contract. The judgment dismisses them all. Our review determines whether as to any count the facts pleaded invoke a substantive remedy, and hence entitle the pleaders to a trial.

COUNT I MINISTERIAL MALPRACTICE

The plaintiffs acknowledge that ministerial malpractice is a tort not known in Missouri law. They argue that the allegations of the petition, that the minister disclosed confidential communications from the Hesters, alienated the affections of the Hester family members, interfered with the business relationship between the Hesters and their farm employees, defamed the Hesters from the pulpit and otherwise in public, invaded their privacy and inflicted intentional emotional distress upon them, all bespeak breaches of a professional standard of care, and hence are suitable for redress by the malpractice remedy.

[3] The term malpractice means professional misconduct. Black's Law Dictionary, p. 864 [5th ed. 1979]. It means "the failure to use that degree of skill and learning *551 ordinarily used under the same or similar circumstances by members of [that] profession." MAI 11.06 [3d ed. 1981]; see also Restatement (Second) of Torts § 299A (1965). It means, by very definition, the breach of a professional duty unique to that profession. I Mo. Tort Law [Mo.Bar 1985], § 1.6 [Medical Malpractice]; § 2.1 [Attorneys Malpractice]; § 2.14 [Accountants Malpractice]; § 2.30 [Insurance Agents and Brokers Malpractice]. Malpractice, therefore, is not a theory of ordinary negligence or of intentional tort. The ordinary negligence or intentional tort of any person is already actionable, regardless of its "professional" color. Thus, also, a cleric is amenable to suit for alienation of affections albeit guised as a religious practice, ¹ for assault and battery committed during a religious service, for a malicious prosecution of parents informed against by the cleric for child abuse, for the obtention of donations of money by fraud, ² and for other incidences of intentional tort in the exercise of the religious duty.³

- 1 Carrieri v. Bush, 69 Wash.2d 536, 419 P.2d 132, 137[15, 16] (1966).
- The range of decisions on the civil liability of clerics and religious leaders for their intentional torts, as well as the sources for such commentary, are reported in Klee, *Clergy Malpractice: Bad News for the Good Samaritan or a Blessing in Disguise?* 17 Toledo L.Rev. 209, 212, n. 23 (1985); Comment, *Made Out of Whole Cloth? A Constitutional Analysis of the Clergy Malpractice Concept,* 19 Cal.W.L.Rev. 507, 512, n. 31 (1983).
- 3 Christofferson v. Church of Scientology, 57
 Or.App. 203, 644 P.2d 577 (1982) (intentional infliction of emotional distress); Bear v. Reformed Mennonite Church, 462 Pa. 330, 341 A.2d 105 (1975) (tortious interference with business relationships).

To avoid a redundant remedy, therefore, any functional theory of clergy malpractice needs address incidents of the clergy-communicant relationship not already actionable. 4 The duties of a clergyman most nearly approximate to an existent professional practice, and hence most accountable to minimum professional standards [preeminent commentators agree], include that of spiritual counseling: the advice a member of the clergy renders to meet the spiritual, emotional, and religious needs of the communicant. ⁵ These authorities agree also—and that, whether they favor or disfavor the clergy malpractice remedy—that the validity of such a tort cause of action is most typically articulated in terms of the pastoral counseling function. The only reported case in which the petition presented the theory of clergy malpractice in terms of negligent counsel and spiritual advice leaves unresolved the question whether such a petition is justiciable.

The petition of the Hester husband and wife pleads not only clergy malpractice, but separate counts for alienation of affections, defamation, intentional infliction of emotional distress, invasion of privacy and intentional interference with contract—all intentional torts, and so acknowledges a subsistent remedy for each of these grievances without need for resort to a malpractice theory, even though each of the torts as pleaded was an incident of the minister-communicant relationship.

B. Bergman, *Is the Cloth Unraveling? A First Look at Clergy Malpractice*, 9 U. San Fern.V.L.Rev. 47, 57–59 (1981); Ericsson, *Clergyman Malpractice: Ramifications of a New Theory*, 16 Val.L.Rev. 163, 166 (1981).

That case, Nally v. Grace Community Church of the Valley, 157 Cal.App.3d 912, 204 Cal.Rptr. 303 (1984), was a claim by parents against a church and its pastors for the wrongful death of a son who committed suicide after counseling by the pastors. The young man, Kenneth Nally, had become depressed after a rift with his girlfriend. Shortly afterward, to the chagrin of his parents, the son converted from Catholicism to Protestantism and became a communicant of the Grace Community Church, a fundamentalist sect. He attended a Bible institute at the church and counseled with the pastor frequently to discuss his problems with the girlfriend and family. His depression deepened, and at the request of his mother, Nally consulted a physician, who placed him on antidepressent medication. Nally attempted suicide, and was hospitalized. Nally stayed at the home of the pastor after release, to avoid the tensions at home. He refused to keep psychiatric appointments since, as he believed, *552 psychiatrists were not Christians and would not be able to help him. A few days later, Nally committed suicide.

The petition of the parents pleaded three counts. Count I, designated "CLERGYMAN MALPRACTICE," alleged that the pastor in his role as spiritual counselor actively discouraged the disturbed parishioner from resort to professional psychiatric or psychological care outside the church. Instead, the pastor advised Nally to consult with church counselors, pray, read the Bible, and listen to taped sermons. The parents alleged that by such conduct the pastor negligently failed to exercise the standard of care for a clergyman of his sect and training with the proximate result that Nally committed suicide. Count II, designated "NEGLIGENCE," alleged the church and the pastor were negligent in the failure to require proper psychological training for their lay spiritual counselors. Count III, designated "OUTRAGEOUS CONDUCT," alleged that the defendants church and pastor disparaged, ridiculed and denigrated the Catholic faith professed by the parents, and thereby exacerbated the feelings of guilt, anxiety and depression the son harbored, and that the exercise of undue influence over Nally prevented the son from contact or consultation with persons outside the church. These actions, the count alleged, amounted to outrageous conduct which proximately caused Nally to become further ridden with guilt, depression and anxiety as to drive him to take his life.

The trial court granted summary judgment against the petition. The majority of the court of appeals posed the question for review [204 Cal.Rptr. at 307]:

We are thus confronted with the question whether a clergyman or church should be immune from liability for intentional infliction of emotional distress caused by the nature or content of counseling simply because the counseling may have a spiritual aspect.

The majority responded [204 Cal.Rptr. at 308 and 309]:

[R]emedies should exist for harm caused by extreme and outrageous conduct even when such conduct involves the expression of religious beliefs.

....

Because we have concluded that triable issues of fact remain as to whether Kenneth Nally's suicide was caused by intentional infliction of emotional distress, we need not also decide whether Pastor MacArthur [the defendant pastor] had a duty to refer Kenneth Nally to a psychiatrist or other mental health professional or whether Pastor MacArthur or the church had a duty to adequately train the pastors in methods of psychological counseling.

Thus, the court of appeals majority resolved that a remedy exists for wrongful death caused by *intentional* infliction of emotional distress caused by a cleric, even though an incident of spiritual counseling. The majority left unanswered, however, the question posed by Count I ["Clergyman Malpractice"] of the petition: whether allegations that advice of a spiritual counselor to a parishioner with known suicidal tendency to confer only with church counselors about his state, and not with outside professionals, states a justiciable claim for clergy malpractice negligence.

[4] [5] The *intentional* torts of a cleric are already actionable, however, even though incidents of religious practice and belief. *Bear v. Reformed Mennonite Church*, 462 Pa. 330, 341 A.2d 105 (1975); *Carrieri v. Bush*, 69 Wash.2d 536, 419 P.2d 132 (1966). *See also Radecki v. Schuckardt*, 50 Ohio App.2d 92, 361 N.E.2d 543 (1976). Liability for

such conduct does not clash with the free exercise clause of the First Amendment because conduct albeit promoted by religious belief is subject to regulation for the protection of society. That is the clear sense of *Cantwell v. State of Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940) at 303, 60 S.Ct. at 903:

The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth *553 Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship ... On the other hand, it safeguards the free exercise of the chosen form of religion. Thus, the Amendment embraces two concepts, -freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. [emphasis added]

Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) confirmed that whereas "the door of the free exercise clause stands tightly closed against religious *beliefs* as such," overt acts prompted by religious beliefs are not free from governmental regulation where the actions "posed some substantial threat to public safety, peace or order." *Id.* at 402–403, 83 S.Ct. at 1792–1793.

Nally, therefore, merely confirms that an *intentional* tort by a cleric may be actionable, albeit the conduct which occasioned the harm [here, pastoral counseling] is related to the exercise of religious belief. Nally leaves unresolved the unavoidable and more vexatious question: whether a theory of clergy malpractice inevitably implicates the *freedom to believe* aspect of the *free exercise clause*, and hence unduly involves courts in matters purely sacerdotal. That is because

a theory of malpractice is defined in terms of the duty to act with that degree of skill and learning ordinarily used in the same or similar circumstances by members of that profession. MAI 11.06 [3d ed. 1981]. It is a theory of tort, therefore, which presupposes that every cleric owes the same duty of care, whatever the religious order which granted ordination, or the cleric serves, or the beliefs espoused. It is a theory of tort, moreover, which inevitably involves the court in a judgment of the competence, training, methods and content of the pastoral function in order to determine whether the cleric breached the duty "to act with that degree of skill and learning ordinarily used in the same or similar circumstances by members of that profession." Thus, the question Nally leaves unanswered is whether pastoral counseling is so ineluctably a function of the particular religion that no one definition of its malpractice can evolve into a standard of professional performance, and is otherwise so purely sacerdotal a function, that it is both unfeasible as a theory of tort and not constitutionally permissible. See, for the full exposition of positions, pro and contra, Bergman, Is the Cloth Unraveling? A First Look at Clergy Malpractice, 9 San Fern. V.L.Rev. 47, 48 et seq. (1981) and Ericsson, Clergyman Malpractice: Ramifications of a New Theory, 16 Val.L.Rev. 163, 169 et seq. (1981).

The authority of *Nally* other than as an exposition of theory, whatever its undoubted impact, is clouded further by the order of the California Supreme Court that the opinion be decertified and be given publication without official status. *Nally v. Grace Community Church of the Valley*, 157 Cal.App.3d 912, 204 Cal.Rptr. 303 [asterisk footnote] (2d Dist.1984). On remand and retrial, the Nally parents proceeded on the theory of clergy malpractice for negligent counseling, and at the close of the presentation of that evidence, the motion of the defendants church and pastors for nonsuit on First Amendment grounds was sustained. The review of the judgment of nonsuit still pends. ⁶

That chronicle of the litigation is as reported by counsel for the Nally parents in Barker, *Clergy Negligence, Are Juries Ready to Sit in Judgment?*, Trial (July, 1986).

The viability of a clergy malpractice remedy for negligent counseling, nevertheless assumed, the petition brought by the Hesters as Count I does not allege the tort. That count pleads the sequence from the outset of the self-introduction by Pastor Barnett to the Hesters as a minister of the Baptist Church, his invitation to them to trust and confide in him,

and his assurances *554 that their confidences would not be divulged outside the family. The count then pleads the disclosure to the pastor of the behavioral problems of the three Wymer children, the invitation by the pastor to counsel the family to relieve the problems, the acceptance by the Hesters, and the breach of that confidence by the divulgence by Pastor Barnett to third persons of the confidences disclosed during counseling. The rest of the averments of Count I assert the state of mind which prompted the disclosures: that Pastor Barnett deliberately misrepresented to others the content of the Hester communications with him-and instructed the Wymer children to lie to others about the nature of the parental discipline "so that the children would eventualy [sic] be removed from plaintiffs' home," and [to that end?] "began a crusade and course of action which is continuing today and which is designed to defame plaintiffs in the community where they live, denouncing them as irreligious and abusive parents." These allegations of intentional disclosure of the confidential communications reposed in him during the family counseling, the animus which prompted them, and the malicious purposes intended, are all iterated as separate counts in terms of established intentional torts: defamation, alienation of affections, invasion of privacy, and the intentional infliction of emotional distress. These torts, however, do not depend for validity upon a standard of professional conduct found, imposed and breached [that is, a malpractice, but upon the duty the law imposes on every person to avoid injury to another.

[6] [7] [8] What remains of the Count I as a pleading of clergy malpractice is the allegation that the defendant Barnett

"acted contrary to ministerial ethics and against Missouri law in particular Section 491.060(H)—[sic, actually § 491.060(4), RSMo Cum.Supp.1987]—and against the standard of conduct imposed upon ministers of the gospel...."

It is the sense of that pleading—the Hesters expound in argument—that § 491.060(4), which renders a clergyman incompetent to testify concerning a communication made to him in the professional character as spiritual advisor, imposes a "minimum standard for the profession," whose nonobservance constitutes both a malpractice and a breach of professional ethics. While the statute no doubt means

to encourage an effective relationship between the spiritual advisor and the communicant, the enactment has no effect beyond its actual terms. State v. Kurtz, 564 S.W.2d 856, 860[10] (Mo. banc 1978). There is no intimation that § 491.060(4) intends any effect beyond a judicial proceeding —let alone a cause of action for the breach. The privilege, moreover, was not known at the common law, and hence the pleading cannot be understood to invoke any tort principle of that system of law to validate a malpractice action for its breach. State v. Kurtz, 564 S.W.2d at 860[10]; C. McCormick, Evidence § 72 (3d ed. 1984). The tradition that a spiritual advisor does not divulge communications received in that capacity, moreover, even if a tenet of "ministerial ethics" as Count I pleads, describes a moral, not a legal duty. In the absence of a legal duty, a breach of a moral duty does not suffice to invest tort liability. T. Cooley, Law of Torts § 3 (4th ed. 1932); J. Dooley, Modern Tort Law § 2.01, at 8 (1982 rev.); Restatement (Second) of Torts, §§ 4 and 5 (1965); Linville v. Ripley, 237 Mo.App. 1275, 173 S.W.2d 687, 690[5–8] (1943).

[9] Count I does not allege a cause of action for clergy malpractice for negligent counseling, and was properly dismissed.

COUNT II ALIENATION OF AFFECTIONS

The next sequence of pleading alleges as a separate count that the Hester husband and wife and the three Wymer children were bound together by love and affection, and that the minister, Barnett, intentionally and maliciously set out to alienate the affections of "one family member from the others." That pleading alleges that the minister advised the wife Hester, "Leave Harold and the doors of Clearmont will be opened to you," so as to imply that separation *555 from her husband would gain the wife "the friendship of members of the community over whom the defendant claims to exercise influence and control." The pleading then alleges [albeit disjointedly in the causation and damages "count" of the petition] that as the direct and proximate result of the tortious conduct, "Hazel Hester ... lost the love, care companionship, consortium and trust of her husband."

That pleading also asserts that the minister intentionally and maliciously alienated the affections of the children from the mother and her husband, and from the children, *inter sese:* Lee Wymer declared to them: "Because of what the preacher has said about you, I do not have a brother or sister nor a mother or a father." Connie Wymer [the petition pleads]

"will have nothing to do with her family, not even notifying plaintiffs of the birth of her child ... nor inviting them to visit her child." Don Wymer, first alienated from the Hesters, "has since changed his attitude gradually toward acceptance of the love of plaintiffs for him."

[10] [11] [12] [13] The tort of alienation of affections of a spouse, albeit discarded as a remedy in many states, remains intact in our jurisdiction. *Kraus v. Kraus*, 693 S.W.2d 869 (Mo.App.1985). The cause of action is delineated in *Gibson v. Frowein*, 400 S.W.2d 418, 421[3] (Mo. banc 1966):

"Alienation of affections is an intentional tort, and the elements of the cause of action are defendant's wrongful conduct, plaintiff's loss of the affections or consortium of his spouse, and the causal connection between such conduct of defendant and the loss by plaintiff."

Count II sufficiently pleads a cause of action for spousal alienation of affections in terms of that formulation, and the dismissal of that separate count was error. The answer the defendant pleads merely denies the allegations of Count II, but does not assert that the conduct described was privileged or was otherwise religious activity within the protection of the free exercise clause of the First Amendment. Conduct or actions which pose "some substantial threat to public safety, peace or order" may be subject to governmental regulation, even though prompted by religious beliefs or principles. Sherbert v. Verner, 374 U.S. at 403, 83 S.Ct. at 1793. The alienation of affections of one spouse from the other disrupts not only personal felicity but also undermines the family relationship. The intentional interference with that relationship by a third person, therefore, is a threat to the public welfare and order the law may redress, the right of the free exercise of religion notwithstanding. Carrieri v. Bush, 419 P.2d at 137[15, 16]; Bear v. Reformed Mennonite Church, 341 A.2d at 107[3]. Where, however, the interference involves merely the preachment of doctrine or advocacy of religious faith, without unlawful or improper motive, no paramount state concern is affected, and the alienation is not actionable. Radecki v. Schuckardt, 50 Ohio App.2d 92, 361 N.E.2d 543, 545[2] (1976); Baugh v. Thomas, 56 N.J. 203, 265 A.2d 675, 677[1] (1970). The alienation Count II pleads cannot be fairly understood to rest on exercises of

the defendant minister purely sacerdotal, but rather malicious conduct—doctrine apart—to separate the wife from the husband. Count II stands as a sufficient pleading for the alienation of spousal affection cause of action.

Count II intermixes with the alienation of spousal affections pleading allegations by the Hesters of the alienation of the affections of the three Wymer children by the intentional and malicious conduct of Pastor Barnett. A child has been denied recovery for the alienation of the affections of the father [Hale v. Buckner, 615 S.W.2d 97 (Mo.App.1981)], but the claim of a parent against a third person for the alienation of the affections of a child remains unaddressed by our courts. Those courts—save one—presented with such a claim have refused remedy. See Annotation, Right of a Child or Parent to Recovery for Alienation of Other's Affections, 60 A.L.R.3d 931 (1974). The refusal rests on concern that such a recovery would render the child a hostage in family disputes. *556 Bock v. Lindquist, 278 N.W.2d 326, 328 (Minn.1979); Bartanus v. Lis, 332 Pa.Super. 48, 480 A.2d 1178, 1181[4, 5] (1984). The analogy of Hale v. Buckner, 615 S.W.2d 97 (Mo.App.1981), and the rationales of Bock and Bartanus suffice to refuse to extend the remedy to the alienated affections of a child. To the extent that Count II undertakes to plead a cause of action by the Hesters for the alienation of the affections of the three children, the order to dismiss Count II is sustained. To the extent the order undertakes to dismiss the Count II as a pleading by husband Hester for the alienation of the affections of wife Hester, it is reversed.

COUNT III DEFAMATION OF CHARACTER

The petition next pleads a sequence of conduct "[s]ince the first day of January of 1984 ... only discovered by Plaintiffs since the first of this year" whereby the defendant "has undertaken to slander, libel and defame the character of Plaintiffs" and used every opportunity and means to publish and broadcast remarks intentionally and maliciously "designed to harm the character and reputation of Plaintiffs ... remarks ... repeated and republished by defendant time after time even to this day." The recitation then describes the slanders and libels and the occasions of publication; that the pastor

(a) delivered sermons from the pulpit of his church wherein the pastor "wrongfully accused Plaintiffs of crimes, stealing, abuse, physical and emotional cruelty to their [sic] spouse, her children and his stepchildren, Connie Wymer, Lee Wymer and Don Wymer"

- (b) repeated these false remarks "[i]n letters, memos, church bulletins and publications"
- (c) made reports to the Missouri Hot Line for Child Abuse of false accusations by the pastor that the plaintiffs abused the children and thereby subjected them to investigation by the Missouri Division of Family Services
- (d) repeated these libels and slanders to neighbors of the plaintiffs in meetings the pastor organized and directed for that purpose
- (e) uttered the specific untrue and defamatory remarks, among others, that
- 1. "Harold Hester is a thief who stole tools from a neighbor."
- 2. "Harold Hester does not pay his employees their earned wages."
- 3. "Harold Hester is an arsonist who burns down barns and other buildings."
- 4. "Harold Hester will cheat anyone out of anything."
- 5. "Harold Hester cheats the Government."
- 6. "Plaintiffs abuse their children mentally and physically."
- 7. "Plaintiffs do not love their children but use them to get work done."
- 8. "Plaintiffs beat their children so badly that they have bruises all over."
- 9. "Plaintiffs punish their children by forcing them to lie face down on the bed of a pickup truck and then drive it over plowed ground and bumpy roads."
- 10. "Plaintiffs whip their children in an excessive and abusive manner."
- 11. "Harold Hester tried to punish Connie Wymer by knocking her into a ditch and then using a bulldozer to cover her with dirt."
- [15] [16] [17] [18] The trial court ruled that these allegations did not state a cause of action for defamation. The court erred. False utterances which hold one up to hatred,

contempt or ridicule, or cause the person to be shunned and avoided, or which "induce an evil opinion of one in the minds of right-thinking persons," are defamations actionable per se. W. Prosser, Law of Torts § 111, p. 739 (4th ed. 1971). A false imputation of crime, by that measure, is defamatory per se, as is a false imputation that a person is dishonest in the business relation, or—by very definition—the imputation that parents cruelly abuse their children. Brown v. Kitterman, 443 S.W.2d 146, 153[8] (Mo.1969). To be sufficient as a *557 pleading for libel per se the petition must set out the defamation published in haec verba—or, at the very least, a paraphrase of what is charged as the libel. Lorenz v. Towntalk Pub. Co., 261 S.W.2d 952, 953[1-3] (Mo.1953); Missouri Church of Scientology v. Adams, 543 S.W.2d 776, 777[3, 4] (Mo. banc 1976); Bremson v. Kinder-Care Learning Centers, 651 S.W.2d 159, 160[4] (Mo.App.1983). The pleaded count for defamation attributes false statements delivered by Pastor Barnett, published and republished among the church membership and the community at large, which impute to Harold Hester the crimes of theft, arson and child abuse, dishonesty in business and cruelty to the children -and to Hazel Hester, the crime of child abuse and the practice of wanton cruelty upon the children. These utterances and publications are pleaded in detail and, if not verbatim, then in substantial paraphrase. Count III pleads actionable defamation. Rules 55.05 and 55.20.

[20] Pastor Barnett contends nevertheless that Count III alleges neither "the time, place [nor] means" of the publications, and hence does not suffice as a libel per se. He argues that absent a declaration of these incidents of publication, a defendant is unable to respond whether the utterances the pleading attributes were privileged or not. It is not the time or place, as such, but "[t]he occasion which determines whether a publication of slander is privileged and whether the slander is, under the circumstances, absolutely or conditionally or qualifiedly privileged." Williams v. School District of Springfield R–12, 447 S.W.2d 256, 267 (Mo.1969). Count III defines the occasions for the publications: sermons from the pulpit of the church, letters and other written publications, reports to the Missouri Hot Line, and at convocations of neighbors the pastor contrived for that purpose. The pleaded response to Count III was, in fact, not only a denial of the allegations, but that the utterances were published "in the performance of his duties as a Minister of the Gospel and as a citizen." The sufficiency of Count III as a pleading for libel assumed, therefore, the question which remains on the propriety of the trial court order to sustain the motion to dismiss that cause of action is whether the pleas

of privilege are as to occasions of utterances which accorded Pastor Barnett absolute immunity of expression—whatever the motives which prompted them. *Id.* at 268[21, 22].

[23] [24] Privilege, absolute or qualified, is a [21] [22] complete defense against liability for libel. W. Prosser, Law of Torts § 114 (4th ed. 1971). A qualified privilege is conditioned upon good motive. Publications uttered with malice forfeit the immunity of the privilege. Malice, however, does not destroy an absolute privilege. Laun v. Union Electric Co., 350 Mo. 572, 166 S.W.2d 1065, 1068[2, 3] (1942). Absolute immunity as to defamatory publications is confined to the few situations "where there is an obvious policy in favor of permitting complete freedom of expression, without any inquiry as to the defendant's motives." W. Prosser, Law of Torts § 114, at 777. Absolute privilege ensures the public policy of freedom of speech " 'where it is essential that freedom of speech should exist.' " Laun v. Union Electric Co., 350 Mo. at 578, 166 S.W.2d at 1071 [11]. The occasions for the absolute privilege are limited and extend to judicial, legislative or executive proceedings [among others], and "to occasions where the communication is provided for and required by law." Pulliam v. Bond, 406 S.W.2d 635, 640 [1, 2] (Mo.1966). The immunity from the utterance of false speech may also be a matter of constitutional privilege. New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

The responsive pleading of Pastor Barnett [25] invokes privilege for the defamations alleged by Count III on grounds that the utterances were published "in the performance of his duties as a Minister of the Gospel and as a citizen." Reports of child abuse or neglect are protected by privilege under § 210.135, RSMo 1978, the pleading alleges, and hence Count III does *558 not state a cause of action for defamation as to those utterances. The immunity from liability that statute grants is not absolute, however, as the pleading implies. It is qualified and conditional. It protects "[a]ny person, official, or institutions complying with the provisions of [the Child Abuse Act] in the making of a report ... [against] any liability, civil or criminal, that otherwise might result by reason of such actions. Provided, however, any person intentionally filing a false report shall not have immunity, from any liability, civil or criminal." § 210.135 [emphasis added]. A qualified privilege "is conditioned upon good motives and reasonable behavior and is forfeited if it is abused." Williams v. School District of Springfield R-12, 447 S.W.2d at 268[21, 22]. The statute itself defines the "reasonable behavior" concomitant of the

privilege: that the report of abuse or neglect be free of intentional falsehood. Count III pleads expressly:

The Defendant, knowing that the reports were false, called the Missouri Hot Line for Child Abuse and reported Plaintiffs falsely accusing them of child abuse [in the particulars separately pleaded] and causing them to be the subject of an investigation by the Missouri Division of Family Services.

Those averments of Count III attribute to Pastor Barnett statements and publications of child abuse practiced by the Hesters on the children, reports known to be false when made, and hence defamatory and beyond the immunity the statute grants.

[28] As to the remainder of the statements alleged [27] by Count III against the defendant as defamations, Pastor Barnett invokes, in defense, "the privilege due a Minister of the Gospel in the performance of his duties." He pleads an absolute privilege against liability as to such communications under the First Amendment mandate of separation of church and state. The First Amendment, however,—as Cantwell v. State of Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213, holds—encompasses the freedom to believe and the freedom to act. Only the freedom to believe is absolute. The freedom to act remains subject to regulation for the protection of society. The courts do not hesitate—as our discussion notes—to impose tort liability upon ministers and churches where the religious conduct otherwise protected "posed some substantial threat to public safety, peace or order." Sherbert v. Verner, 374 U.S. at 403, 83 S.Ct. at 1793. It is the freedom to believe the law protects absolutely, and not always how the belief is acted out—whatever the injury to others. Thus, where the truth or falsity of religious belief becomes the object of judicial redress, the inquiry "enter[s] a forbidden domain." United States v. Ballard, 322 U.S. 78, 87, 64 S.Ct. 882, 886, 88 L.Ed. 1148 (1944). That is because the First Amendment protects religious belief. "Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or belief." Id. at 86, 64 S.Ct. at 886. A defense based on the Free Exercise Clause, therefore, presents a concern in an action for defamation which does not inhere in the other formulations of tort the petition asserts against

Pastor Barnett. That is because defamation involves the truth or falsity of published speech and published speech is a usual means to propagate religious belief. *Christofferson v. Church of Scientology*, 57 Or.App. at 236, 644 P.2d at 598 [8].

[30] [31] [32] A defamation injures reputation, and false accusation of crime, of dishonesty in business, and of primitive cruelty to one's children do severe damage to the personality, dignity and sensibility of the one accused. The denial of legal recourse in such cases engenders a sense of unfairness and frustration in the persons injured and, left unrequited, tends to fester into a substantial threat "to public safety, peace or order." A court, as the organ of government to which a citizen turns for redress of wrongs, therefore, may justly allow the vindication of the right to reputation without constitutional infringement—albeit the words and conduct of defamation were uttered in a religious setting. *559 Sherbert v. Verner, 374 U.S. at 403, 83 S.Ct. at 1793; Bear v. Reformed Mennonite Church, 341 A.2d at 107. It is only religious belief and practice the free exercise clause protects absolutely against governmental regulation, and not secular belief and practice. Wisconsin v. Yoder, 406 U.S. 205, 215, 92 S.Ct. 1526, 1533, 32 L.Ed.2d 15 (1972); Gitlow v. New York, 268 U.S. 652, 666, 45 S.Ct. 625, 629, 69 L.Ed. 1138 (1925). The claim and proof of defamation, therefore, may not involve the truth or falsity of statements of religious belief or tenet made by Pastor Barnett. They may show, however, that although delivered in the milieu of religious practice, the beliefs asserted as religious were not held as such in good faith, but were used to cloak a secular purpose: in this case, to injure reputation. United States v. Ballard, 322 U.S. at 85-86, 64 S.Ct. at 885–886; Founding Church of Scientology v. United States, 409 F.2d 1146, 1162 (D.C.Cir.1969). The statements alleged by Count III are not of the kind inherently and invariably expressions of religious belief or religious purpose so as to come under the absolute protection of the free exercise clause against governmental regulation. They are not of the kind, therefore, as to which judicial remedy constitutes an undue burden on the free exercise of religion.

[33] Our decision rests on the assumption that the Hesters were not members of the church served by Pastor Barnett. The petition alleges only that Pastor Barnett presented himself to them as the minister of the Baptist Church in Clearmont and invited the Hesters to confide in him. They responded with the confidences about the problems with the children. There is no intimation in the petition or answer that the Hesters were members of the Clearmont Church, or that they subjected themselves to the doctrine, religious practices or discipline

of the church or its congregation. Among the defamations Count III alleges against the pastor were statements made in the course of sermons delivered from the pulpit. The free exercise clause forbids a court from any evaluation of the "correctness" of the content of religious sermons as expressions of belief or religious practice. Fowler v. State of Rhode Island, 345 U.S. 67, 70, 73 S.Ct. 526, 527, 97 L.Ed. 828 (1953). The stricture of the free exercise clause is against "any governmental regulation of religious beliefs as such." Sherbert v. Verner, 374 U.S. at 402, 83 S.Ct. at 1792. It is competent, therefore, for a court to inquire whether the sermon declarations that the Hesters stole, committed arson and abused their children were expressions of actual creed and practice, held and exercised in good faith, or were merely the religious occasion for the wholly secular purpose of intentional defamation and injury to reputation of persons not even communicants of the church.

[34] [35] [36] It may be that the statements from the clause. pulpit, and the several others asserted against Pastor Barnett as defamations, were a form of chastening usual as to wayward members and conformable to the liturgy, discipline and ecclesiastical policy of the church and congregation. If so, and if the Hesters were members of that religious body, they presumptively consented to religiously motivated discipline practiced in good faith. *Rosicrucian Fellowship v. Rosicrucian Nonsectarian Church,* 39 Cal.2d 121, 245 P.2d defamation of the clause.

"'It is perfectly clear that, whatever church relationship is maintained in the United States, is not a matter of status. It is based ... on voluntary consent ... It is "one of contract," and is therefore exactly what the parties to it make it and nothing more. A person who joins a church covenants expressly or impliedly that in consideration of the benefits which result from such a union he will submit to its control and be governed by its laws, usages and customs whether they are of an ecclesiastical or temporal character to which laws, usages, and customs he assents as to so many stipulations of a contract."

The consent to submit to the discipline of the church, sect, or congregation is one of contract, therefore, between the member and the religious body. The discipline the *560 religious body may impose, accordingly, must be within the terms of the consent. Damage incurred within the terms of consent is a nontortious consequence. "It is a fundamental principle of the common law that *volenti non fit injuria*—to one who is willing no wrong is done." W. Prosser, The Law of Torts § 18 (4th ed. 1971); 86 C.J.S. Torts § 12 (1954).

[37] [38] The statements from the pulpit, and the others, moreover—if as to members and if as expressions, bona fide, of the religious practice of the church or congregation—are privileged as communications enjoined by duty [upon the pastor] to persons [church members] with a corresponding interest or duty. Kersting v. White, 107 Mo.App. 265, 80 S.W. 730, 734 (1904); Haynes v. Robertson, 190 Mo.App. 156, 175 S.W. 290, 293[9] (1915); Restatement (Second) of Torts § 596, comment e (1977). The privilege, however, is qualified, and is lost if the plaintiffs prove the defendant acted with the intention to injure the plaintiffs in reputation, feelings or profession. Kersting v. White, 80 S.W. at 734; Annotation: Defamation—Religious Activities, 87 A.L.R.2d 453 (1963); C. Zollman, American Civil Church Law at 392 (1917). The use of the pulpit as the pretext for the practice of religion, but as the occasion for intentional defamation, therefore, is neither justified by privilege nor protected by the free exercise

[39] [40] We construe Count III, given its best intendments, to plead a cause of action against Pastor Barnett in defamation. The burden to prove the defense of privilege—qualified or absolute—rests on the person who asserts the privilege. *Williams v. School District of Springfield R-12*, 447 S.W.2d at 265[7, 8]. If the evidence shows consent to the defamations, there was no tort proven. The proof may show otherwise that the statements the Hesters claim as defamations were, as a matter of law, expressions of religious belief or so nearly so in practice that they come under the absolute protection of the free exercise clause. If so, the issue of defamation will not be submissible. We hold only that Count III pleads a justiciable claim for defamation.

COUNT IV INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

[41] The rubric notwithstanding, Count IV pleads expressly the tort of extreme and outrageous conduct as introduced in *Pretsky v. Southwestern Bell Telephone Company*, 396 S.W.2d 566 (Mo.1965). The gist of the tort is the intentional infliction of emotional distress on another by conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.* at 568, 569; Restatement (Second) of Torts § 46, comment d (1965). It is conduct so extreme as to exceed any reasonable

limit of social toleration. *Frye v. CBS INC*, 671 S.W.2d 316 (Mo.App.1984).

Count IV pleads that:

20. Defendant, "with malicious intent to cause plaintiffs emotional distress intentionally did those actions described specifically in other Counts knowing that Plaintiff Hazel Hester was nervous and suffered frequent and severe attacks of depression and knowing Plaintiff Harold Hester suffered from high blood pressure and nervous tension and was subject to heart attacks all with the malicious design to cause emotional distress and aggrivate [sic] plaintiffs' known physical ailments all to their damage as hereafter more specifically described."

The allegations do not suffice as a pleading for the extreme and outrageous cause of action. However dismal the motives and however censurable the designs, the conduct pleaded is not extreme and outrageous, and therefore is not tortious—unless the allusion to "those actions described specifically in other Counts" aid the pleaders. *Id.* Those allegations, already recapitulated, recite breach of confidence, incidents of alienation of affections, of defamation, of invasion of privacy, and of interference with contract. These counts are each pleaded as disparate causes of action.

*561 [42] [43] [44] Rule 55.12 allows a pleader to adopt by reference statements "in a different part of the same pleading or in another pleading or in any motion." The rule replicates Rule 10(c) of the Federal Rules of Civil Procedure. The adoption by reference technique is designed to avoid the repetition and redundancy characteristic of the common law system of pleading. 2A Moore's Federal Practice § 10.05 (2d ed. 1985). The adoption by reference, however, must subserve the dominant objective of the rules of pleading: that "[e]ach averment of a pleading shall be simple, concise and direct" [Rule 55.04], and that "[a] pleading ... shall contain ... a short and plain statement of the facts ..." [Rule 55.05]. The adoption by reference procedure, therefore, does not dispel the requirement that the pleading—as enhanced by the reference adopted—be "simple, concise and direct." That is because the function of pleadings is to "present, define and isolate controverted issues so as to advise the trial court and the parties of the issues to be tried and to expedite the trial of the cause on the merits." Pillow v. General American Life Ins. Co., 564 S.W.2d 276, 280[2, 3] (Mo.App.1978). A reference not sufficiently clear and explicit to advise the adversary of the issue tendered for trial, therefore, is not effective as

an incorporation or pleading. *Texas Water Supply Corp. v. Reconstruction Finance Corp.*, 204 F.2d 190 (5th Cir.1953).

The quandary the adoption by reference Count IV presents the adversary pleader is evident. Count IV attempts the extreme and outrageous conduct cause of action. A glance at the composite petition discloses averments of conduct attributed to Pastor Barnett, indeed extravagant and socially censurable to the extreme: that Pastor Barnett falsely accused the Hesters of crimes: "Harold Hester is a thief who stole tools from a neighbor"; "Harold Hester will cheat anyone out of anything," etc. Also, that Pastor Barnett falsely reported and accused the Hesters on the Missouri Hot Line of child abuse and so caused them to be the subject of investigation. Also, that the Hesters were inhumanly cruel to the children: "Plaintiffs [the Hesters] punish their children by forcing them to lie down on the bed of the pickup truck and then drive it over plowed ground and bumpy roads"; "Harold Hester tried to punish Connie Wymer by knocking her into a ditch and then using a bulldozer to cover her with dirt," etc. These and other like attributions of infamous conduct were alleged against Pastor Barnett in Count III-as defamations. That pleading attributes these and the numerous others to Pastor Barnett, as false publications made with the intent to injure reputation, delivered from the pulpit, in church circulations, at meetings convoked for that purpose, and on other occasions. Those statements and publications as alleged in Count III constitute defamation, and only defamation. "[A]ny action seeking damages for an untrue statement should be in libel." Barber v. Time, Inc., 348 Mo. 1199, 159 S.W.2d 291 (1942). To allow defamation Count III to be incorporated into extreme and outrageous conduct Count IV would be to allow-not an alternative remedy—but a redundant and duplicate remedy. Cf. Rule 55.06(a).

[46] The composite pleading, exclusively of Causation and Damages Count VII, consists of a sequence of forty-nine enumerated separate recitations—paragraphs and subparagraphs. These are interspersed among six formulations of tort—negligent and intentional. It would have been simple for the pleader merely to specify by number or letter the enumerated allegations the plaintiffs meant to incorporate. It is not the role of the defendant to define the cause of action for the plaintiffs, and then to defend against it. Nor is it the role of the court on a motion to dismiss to shape extraneous recitations in other counts into a cause of action to match the rubric for remedy the pleader attributes. The attempted incorporation by reference by allusion to "those actions described specifically in other Counts" does

not inform the defendant as to the nature and extent of the incorporation, and hence is ineffective as an adoption by reference under *562 Rule 55.12. See Heintz & Co. v. Provident Tradesmen's Bank & Trust Co., 29 F.R.D. 144, 145[4, 5] (E.D.Pa.1961). Count IV was properly dismissed for failure to state a cause of action.

COUNT V INVASION OF PRIVACY

The right to privacy as a general doctrine of tort was recognized by our Supreme Court in *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (1942). The general right to privacy, our Supreme Court en banc then held in *Sofka v. Thal*, 662 S.W.2d 502 (Mo. banc 1983), expressed four separate interests, and the invasion of privacy described four different torts, each with distinct elements. *Sofka* [at 510] adopted the Restatement (Second) of Torts § 652B (1977) formulations that the right to privacy is invaded when there is

- (1) unreasonable intrusion upon the seclusion of another
- (2) appropriation of the other's name or likeness
- (3) unreasonable publicity given to the other's private life
- (4) publicity that unreasonably places the other in a false light before the public.

In its delineation of the action for invasion of privacy, *Barber* determined [348 Mo. at 1208, 159 S.W.2d at 296[12–15]] that "truth or untruth is not an issue." "[A]ny action seeking damages for an untrue statement should be in libel." *Sullivan v. Pulitzer Broadcasting Company*, 709 S.W.2d 475 (Mo. banc 1986) adopted the *Barber* rationale that the proper remedy for the publication of *untrue* private facts is defamation, to deny redress to a claim formulated on the false light invasion of privacy theory, but actually "nothing more than the classic defamation action where one party alleges that the other published a false accusation concerning a statement of fact—in this case, a charge of criminal conduct or wrongdoing." *Id.* at 481.

Count V pleads:

21. Defendant has intruded upon plaintiffs' solitude and seclusion by entering into plaintiffs' home under the disguise [sic] of helping them and their family through family counselling and assistance with the children's behavior problems when defendant's true motive was to harm plaintiffs and for which he would not have

- been permitted into their home had plaintiffs known defendant's true motive.
- 22. Defendant has made public by reporting to School Authorities, Juvenile Authorities, Law Enforcement Authorities and the Hot Line for Child Abuse certain untrue accusations, more specifically stated in other Counts hereof ⁷ for the intended purpose of disturbing the privacy of plaintiffs, subjecting them to intrusion by investigators, social workers, psychologists and law enforcement officers intruding upon their solitude and seclusion all to their damage as hereafter more specifically set forth.
- The adoption by reference into Invasion of Privacy Count V of "certain untrue accusations, more specifically stated in other Counts hereof" can allude only to ¶ 14d which contains those allegations of untrue accusations, and so validly accomplishes the incorporation under Rule 55.12.
- [49] The Hesters say that ¶¶ 21 and 22 plead [47] the essential elements of three invasion of privacy torts: (1) unreasonable intrusion upon the seclusion of another (2) unreasonable publicity given to the other's private life (3) publicity that unreasonably places the other in a false light before the public. Count V pleads two components of facts: ¶ 21 relates to invasion of privacy by conduct, without publicity or publication of words; ¶ 22 relates to an invasion of privacy by public disclosure of private facts. The unreasonable intrusion upon the seclusion of another tort encompasses three elements: (1) the existence of a secret and private subject matter; (2) a right in the plaintiffs to keep that subject matter private; and (3) the obtainment by the defendant of information about that subject matter through unreasonable means. Corcoran *563 v. Southwestern Bell Telephone Co., 572 S.W.2d 212, 215[6] (Mo.App.1978). Publicity is not an element of that tort. Sofka v. Thal, 662 S.W.2d at 510. Count V, ¶ 21, sufficiently pleads the tort. It is the sense of that pleading that Pastor Barnett gained access to the Hester home through the pretense as counselor to assist in the correction of the children's behavior, when the true motive was to harm the Hesters by the disclosure of the information obtained through that guile. These allegations, taken as true, describe a substantial interference with seclusion and of the kind decidedly offensive to reasonable persons. Corcoran v. Southwestern Bell Telephone Co., 572 S.W.2d at 215[7]. See Restatement (Second) of Torts § 652B, commend d (1977). It was error for the trial court to dismiss Count V.

- [50] [51] Count V, ¶ 22, however, suffices neither as a statement of claim for the unreasonable publication of private facts tort, ⁸ nor for a false light invasion of privacy. The tort of invasion of privacy is not a species of defamation. Where the claim for recovery on either theory—the publication of private facts or a false light invasion of privacy—involves *untrue* statements, the appropriate remedy is by defamation. *Barber v. Time*, 159 S.W.2d at 296; *Sullivan v. Pulitzer Broadcasting Co.*, 709 S.W.2d at 478. The allegations of ¶ 22 are as those before the court in *Sullivan:* "the classic defamation action where one party alleges that the other published a false accusation concerning a statement of fact—in this case, a charge of criminal conduct or wrongdoing." 709 S.W.2d at 478. [The very subject of ¶ 22 was, in fact, one of the pleaded grounds [¶ 14–d] of defamation Count III].
- 8 Corcoran v. Southwestern Bell Telephone Co., 572 S.W.2d at 214[3] delineates as the elements of the public disclosure of private facts tort:
 - (1) publication (2) absent any waiver of privilege (3) of private matters in which the public has no legitimate concern (4) such as to bring shame or

humiliation to a person of ordinary sensibility.

[52] Count V pleads injury to the Hesters from a course of intentionally tortious action by a minister, on an occasion only pretextually religious, but actually entirely secular, and hence not offensive to the free exercise clause.

Count V is reinstated as a pleading for the intrusion upon seclusion invasion of privacy tort.

COUNT VI TORTIOUS INTERFERENCE WITH CONTRACT

Count VI pleads:

- 23. Defendant has enticed, harassed, intimidated, threatened and caused employees of Plaintiffs to leave their employ thereby rendering Plaintiffs unable to employ and maintain the necessary labor to conduct their farming business, their earth moving and construction business and their business of building and maintaining a lake and airplane landing strip on Plaintiffs' south farm.
- 24. Defendant's said actions are continuing today through the harassment, intimidation and threats against plaintiffs' only remaining employee, Mack Ellison.

- 25. Defendant's actions are intentional and malicious and calculated by defendant to harm plaintiffs' businesses and in fact harming his businesses by causing their employees to quit their employ and thereby damage plaintiffs as more specifically set forth in the last paragraph hereof.
- [53] [54] [55] [56] The elements of a cause of action for tortious interference with contract or business relations are repeated in *Francisco v. Kansas City Star Co.*, 629 S.W.2d 524, 529[1, 2] (Mo.App.1981):
 - (1) a contract or valid business relationship or expectancy
 - (2) knowledge by the defendant of the contract or relationship
 - *564 (3) intentional interference by defendant which induces the breach of contract or relationship
 - (4) Absence of justification
 - (5) resulting damages

Count VI suffices to plead the cause of action, and the dismissal was error. Eib v. Federal Reserve Bank of Kansas City, 633 S.W.2d 432, 435[2] (Mo.App.1982). It is enough that the petition plead a business relationship, present or future, with which the defendant has knowingly interfered, without justification, to the damage of the pleaders. Casterline v. Stuerman, 588 S.W.2d 86, 88 (Mo.App.1979). The proof, of course, must show an intent and primary purpose in the actor to interfere and to cause the result the interference augurs. Francisco v. Kansas City Star, 629 S.W.2d at 530[6]. The proof of the cause of action must also show that the interference was without justification —that is to say unprivileged as well as unlawful. Id. at 533–534[8–11]. The petition pleads that the interference was "intentional, malicious and calculated by defendant to harm plaintiffs' businesses ... by causing their employees to quit their employ and thereby damage plaintiffs." The petition pleads also that the interference was accomplished by enticements, harassments, intimidations and threats so as to cause the employees to leave and hamper the plaintiffs in the conduct of their businesses. Those allegations, conjoined with the others, suffice to plead a prima facie cause of action of the intentional interference with a known contractual and business relationship with the intent to injure and without justification. It is not significant to the cause of action that the employments the defendant disrupted were at will [as we assume from the allegations]. It is the reasonable expectancy

of persons who contract at will that the subsistent relationship will continue into the future unless terminated *inter sese*. That does not justify a third person, without privilege, to induce the breach with the purpose to do injury to a party to the contract. Restatement (Second) of Torts § 766. comment g. *Cook v. MFA Livestock Association*, 700 S.W.2d 526, 528–529 (Mo.App.1985); *Alyeska Pipeline Service v. Aurora Air Service*, 604 P.2d 1090, 1093 (Alaska 1979); Dobbs, *Tortious Interference with Contractual Relationships*, 34 Ark.L.Rev. 335 (1981). In the context of the pleading, those allegations, moreover, were merely part of the design to interfere with business relations and to subvert going enterprises.

[57] These allegations of unlawful enticements, intimidations and threats—whatever the actual proof—describe secular conduct, the pretext of religious purpose notwithstanding, and hence state a cause of action outside the scope of the free exercise clause.

The dismissals of Ministerial Malpractice Count I and Extreme and Outrageous Conduct Count IV are affirmed. The dismissals of Alienation of Affections Count II, Defamation Count III, Invasion of Privacy Count V, and Tortious Interference with Contract Count VI are reversed, and those counts are ordered reinstated. Count II is reinstated as a cause of action for alienation of spousal affection, and Count V is reinstated as a cause of action for the invasion of privacy by the unreasonable intrusion upon the seclusion of another. The costs are allocated equally between the plaintiffs and the defendant.

All concur.

All Citations

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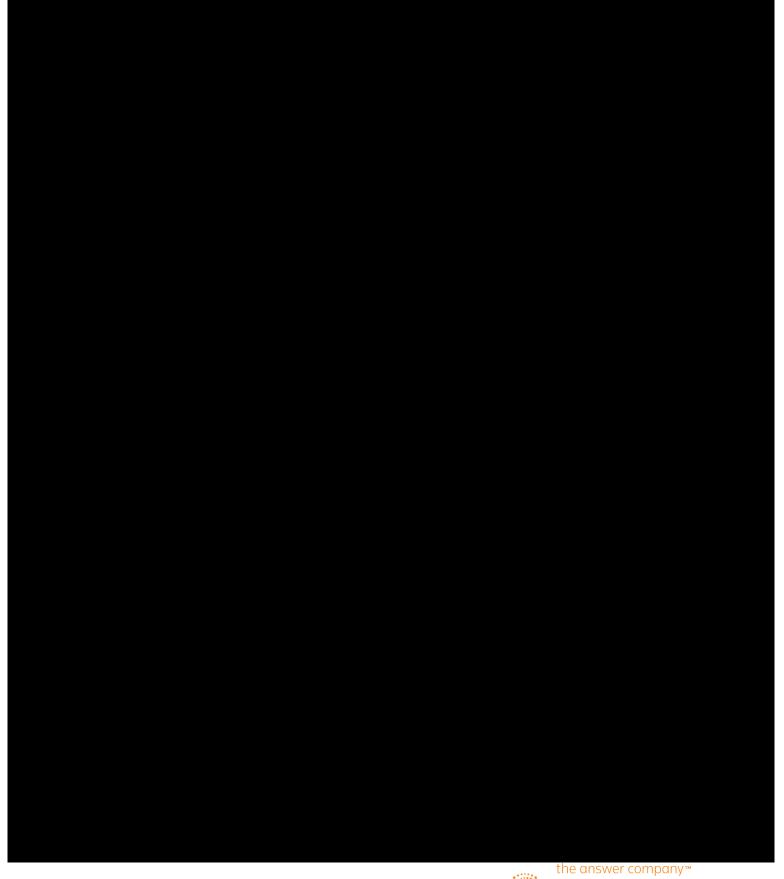
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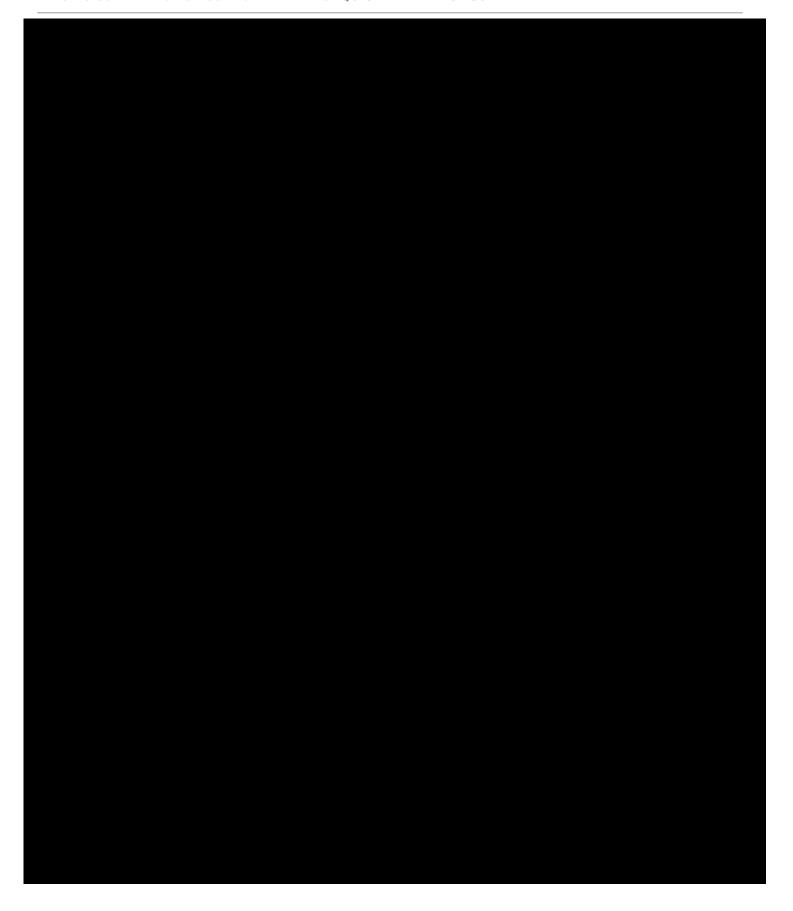
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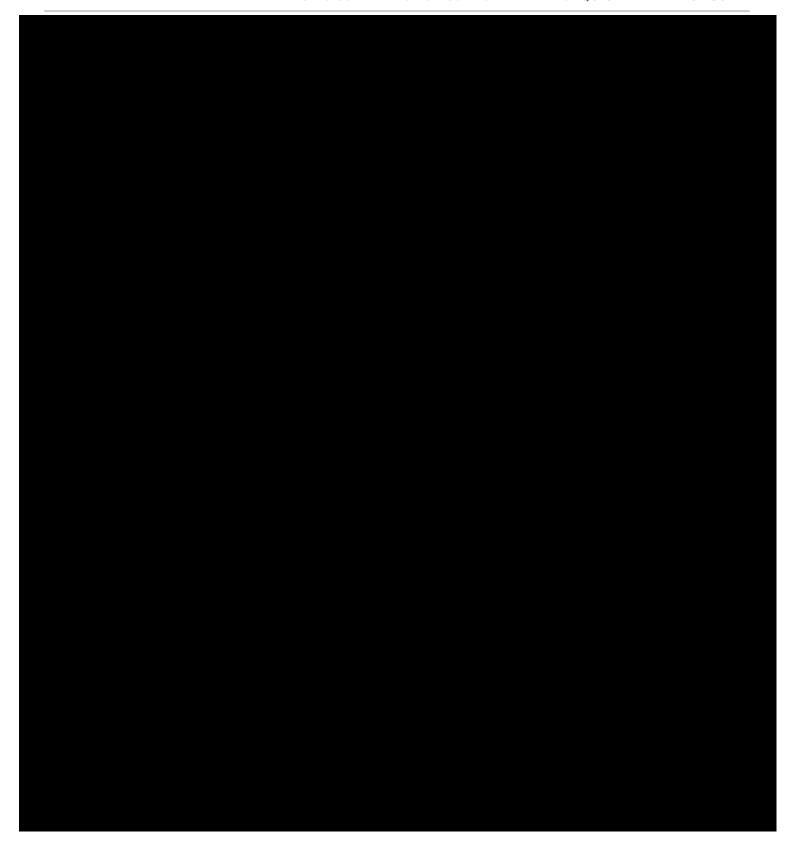


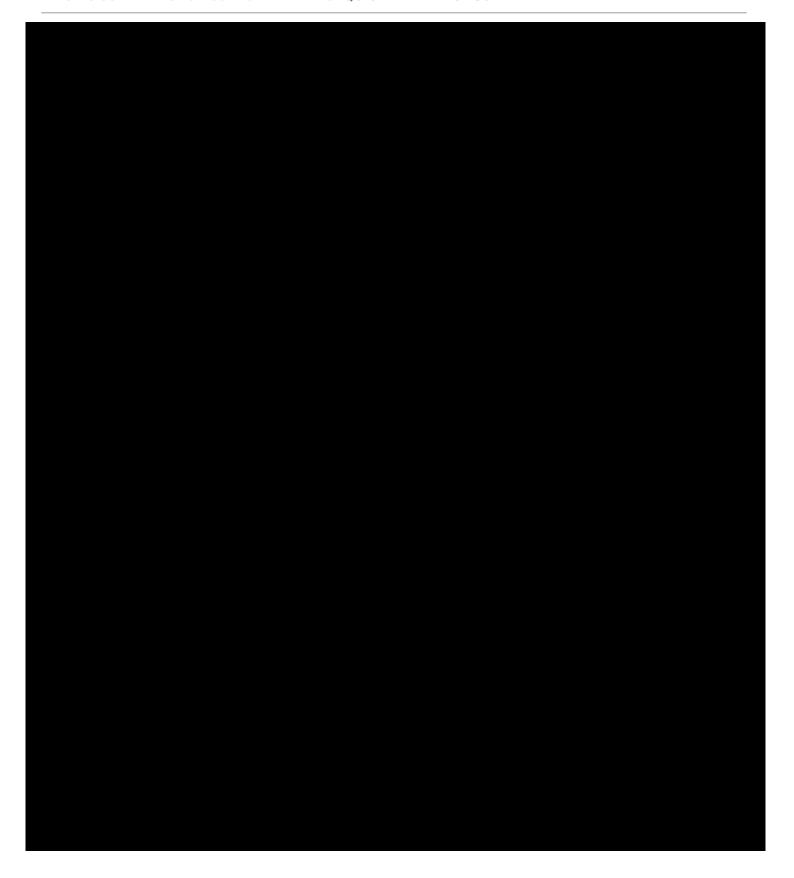
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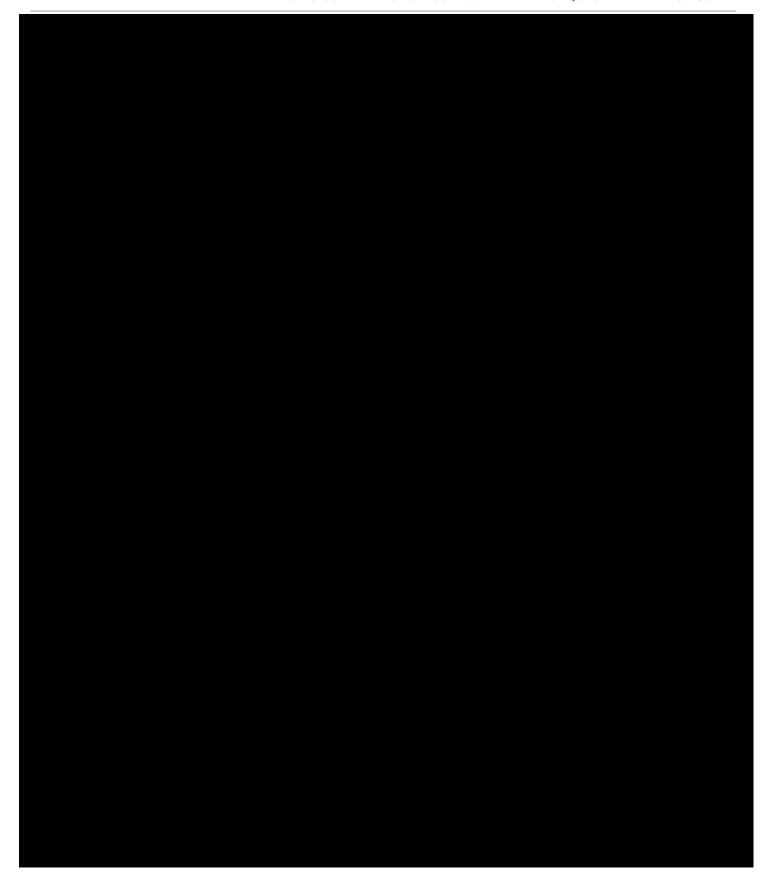
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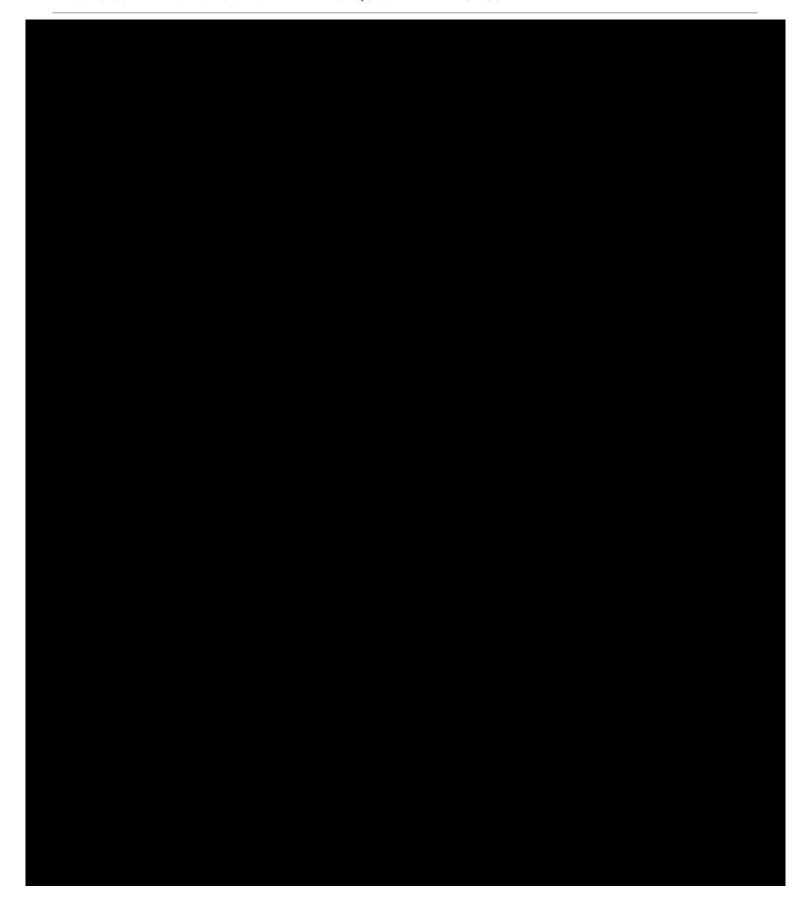




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